88-615

Supreme Court, U.S.
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No. 88-——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

ROBERT I. SILVERMAN, *et al.*,
Petitioners,

v.

MARION BARRY,
Mayor of the District of Columbia, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

I. Have Petitioners been deprived of property rights, without due process, by a District of Columbia statute which delegates, to a minority of tenants in a multi-family apartment building, the absolute and unreviewable power to block a conversion of that building to a condominium or a cooperative, irrespective of the contrary wishes of the owner and the remaining tenants?

II. Did the District of Columbia's violation of its own laws, for which Petitioners have no other remedy, constitute a violation of 42 U.S.C. § 1983, and, in this regard, what is the proper standard for determining whether the victim of illegal governmental action, having no non-federal remedy, has a claim under § 1983?

PARTIES

Petitioners are Robert I. Silverman, Howard Polinger and WAVN, Inc., the sole general partners of Van Ness Properties III, a District of Columbia limited partnership which developed and owned a multi-unit apartment building known as Van Ness South just off Van Ness Street, N.W., in the District of Columbia. At the present time, there are 90 limited partners of Van Ness Properties III. Petitioner WAVN, Inc. is a private corporation without parent, subsidiary or affiliate and is owned by the partners of the former District of Columbia law firm of Wilkes & Artis.

Respondents are Marion Barry, Mayor of the District of Columbia, Robert Moore as Director of the Department of Housing and Community Development of the District of Columbia, Marguerite C. Stokes as Acting Recorder of Deeds for the District of Columbia, the Department of Housing and Community Development of the District of Columbia, and the District of Columbia.

A group of tenants, calling itself the Group To Save Van Ness for Everybody, Inc., intervened as a defendant in the District Court, in support of the District of Columbia defendants.

At the time of the filing of this action, there was an additional plaintiff, The Investment Group Development Corporation, a private corporation which had contracted to purchase the partnership's apartment building, subject to the right to convert it to a condominium or cooperative. That plaintiff rescinded its purchase contract with Petitioners, and it withdrew from the case following the decision of the U.S. District Court below.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners respectfully petition for a writ of certiorari to review the Judgment rendered by the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The May 3, 1988 Opinion and Order of the Court of Appeals for the District of Columbia Circuit are reprinted as Appendix A (App. 1a-31a); the Opinion is also reported at 845 F.2d 1072. The July 15, 1988 Order of the Court of Appeals, denying Petitioners' suggestion for rehearing *en banc* and including the separate Opinion of Circuit Judge Silberman, is reprinted in Appendix B (App. 32a-39a); it is also reported at 851 F.2d 434. The August 22, 1986 Opinion of the District Court is reprinted as Appendix C (App. 40a-64a); it has not been officially reported.

JURISDICTION

The Judgment of the Court of Appeals was entered on May 3, 1988. Petitioners filed a timely Petition for Rehearing And/Or Suggestion for Rehearing *En Banc* on June 1, 1988, which Petition was denied by that Court of Appeals on July 15, 1988. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTES INVOLVED

A. 42 U.S.C. § 1983 Civil Action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of

Columbia shall be considered to be a statute of the District of Columbia.

B. D.C. Code § 45-1611 (1981 Ed.) Conversions.

(a) *Prerequisite.*—(1) An owner shall not convert a housing accommodation into a condominium or a cooperative until the Mayor certifies compliance with the provisions of this chapter.

(2) Only an owner may request a tenant election to convert * * * an accommodation. * * *

C. D.C. Code § 45-1612 (1981 Ed.) Tenant Election

(a) *Notice by owner.*—An owner who seeks to convert shall provide each tenant and the Mayor a written request for a tenant election * * *.

* * * *

(d) *Qualified voter.*—A head of household residing in each rental unit of the housing accommodation is qualified to vote unless no member of the household has resided in the accommodation for at least 90 days before the election, or unless a member of the household is or has been an employee of the owner within 120 days prior to the date of application for eligibility, or unless he or she is a head of household whose continued right to remain a tenant is required by this chapter. The Mayor shall determine the eligibility of voters prior to the election and shall devise such forms and procedures as may be necessary to verify eligibility under this subsection.

* * * *

(j) *Compliance not approved.*—If 50 percent or less of the qualified voters vote in approval of conversion, or if an election is invalidated by the Mayor because of fraud or coercion in favor of conversion on the part of the owner, the Mayor shall not certify compliance with this section for purposes of conversion, and an owner may not request another tenant election for that accommodation for 1 year from the date of the election.

D. D.C. Code § 45-1616 (1981 Ed.) Elderly tenancy.

(a) *Eviction limited.*—Notwithstanding any other provision of this subchapter, the Condominium Act, or the Rental Housing Act, an owner of a rental unit in a housing accommodation converted under the provisions of this chapter shall not evict or send notice to vacate to an elderly tenant with an annual household income, as determined by the Mayor, of less than $40,000 per year unless:

* * * *

(c) *Definition.*—For the purposes of this subchapter, the term "elderly tenant" means a head of household who is 62 years of age or older. The number of elderly tenants qualifying under this section is that number on the day an owner requests a tenant election for purposes of conversion.

E. Other Provisions of District of Columbia Law

1. The applicable provisions of the District of Columbia's Condominium Act of 1976, providing for conversion to condominiums of "high rent" buildings, are set out in Appendix E (App. 83a-84a).

2. The applicable provisions of the District of Columbia's emergency Act, providing for the conversion of "high rent" buildings to cooperatives as of April 25, 1979, are set out in Appendix F (App. 91a).

3. The applicable provisions of the District of Columbia moratorium Act, precluding conversions on the basis of "high rent" eligibility, are set forth in Appendix G (App. 92a-93a).

STATEMENT OF THE CASE

A. Introduction

This case involves two contiguous time frames: first, from early 1979 until August 9, 1980; and second, August 10, 1980 to the present.

As of early 1979, Petitioners were, and still are, the sole general partners of Van Ness Properties III, a Dis-

trict of Columbia limited partnership which then owned, and had previously developed, a high-rise rental apartment building known as Van Ness South, located just off Van Ness Street, N.W. in the District of Columbia. In the early part of 1979, Petitioners wanted to convert the rental building to a condominium or a cooperative under the then prevailing law. As more fully discussed *infra*, their attempts to convert, first alone and then with the participation of a majority of tenants, were totally and illegally thwarted and delayed by the District of Columbia, until August 10, 1980 when new legislation was enacted. The position of the District of Columbia is that whatever may have occurred before August 10, 1980, Petitioners' right to convert, or to other relief, can be found only in the new 1980 legislation.

One issue, therefore, is whether the early 1979-August 9, 1980 deprivation of Petitioners' statutory right to conversion, for which no District of Columbia remedy has been made available, constitutes a violation of 42 U.S.C. § 1983. The other issue is whether the new legislation, first enacted as of August 10, 1980, imposes a new restraint which itself violates the Fifth Amendment.

The constitutional issue under the new 1980 legislation, which is still in force, arises from the fact that conversion depends upon the approval, in a formal election, of *more* than 50% of tenants *eligible* to vote. Since, under that law, certain tenants are not eligible to vote, 50% of the eligible tenants (who may block a conversion) may well be a small minority of the totality of tenants. Hence, a minority of the tenants, under the 1980 legislation, will determine whether there will be a conversion, irrespective of the wishes of the owner and a majority of all tenants. This type of decision-making delegation to a small group of private citizens, acting without guidelines or accountability and for their own personal interests, was held to be violative of the due process clause in decisions of this Court. Those decisions,

however, have resulted in uncertainty, dispute and conflict among Courts.

B. The Early 1979 to August 9, 1980 Time Frame

As of the period from January 1, 1979 to April 25, 1979 (as well as previously), the Condominium Act of 1976 [1] granted an absolute right to convert, to a condominium, a so-called "high rent" building, namely a building whose rents per unit equaled or exceeded statutory minimums.[2] Van Ness South, which could colloquially be called a luxury building, indisputably constituted a "high rent" building entitled to conversion. Similarly, the law governing conversion to a cooperative contained the same "high rent" provision during this same January 1 to April 25, 1979 period of time.[3]

During the same time frame, the District of Columbia, by administrative rule, required that an owner or contract purchaser, before going through with conversions, first apply for and obtain a certificate of eligibility ("C/E") to convert to a condominium, or a certificate of exemption ("C/Ex") to convert to a cooperative. These certificates acknowledged the ability to convert.

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[1] D.C. Law 1-89, which was codified as D.C. Code § 5-1201 *et seq.* (Supp. V 1978 ed.) and thereafter, in part, as D.C. Code § 45-1801 *et seq.* (1981 ed.).

[2] The Condominium Act of 1976, D.C. Law 1-89, § 501(b)(1) is reprinted in Appendix E (App. 83a-84a). The level of rents, necessary to qualify for "high rent" status, was amended by Emergency Acts in November 1978 and again in February 1979, which amendments are also reprinted in Appendix E at App. 85a-86a and App. 87a-88a, respectively.

[3] The applicable provisions of the District of Columbia's First Emergency Cooperative Regulation Act of 1979, E.A. 3-2, effective January 25, 1979 and expiring on April 25, 1979, are reprinted in Appendix F (App. 89a-90a). The preceding 90-day Emergency Act, effective October 25, 1978, is not reprinted but contained the same provisions as to "high rent" conversions, except for the necessary rent levels which were raised in 1979.

This state of the law as to condominiums and cooperatives changed on April 25, 1979 when the legislation, restricting cooperative conversions, expired for nine days.[4] Even though the District had no legislative authority to restrict cooperative conversions from April 25 to May 4, 1979, the District's policy remained the same, namely it would prevent conversions unless the building were eligible under a statute that had expired, and unless the District granted a C/Ex which it had no authority to demand or issue.[5] This was the District's first apparent illegality, since it should have allowed conversion to cooperative status during that 9-day period.

Aware of the District's policies, Petitioners, on April 26, 1979, filed applications for a C/Ex (illegally being required) and a C/E. For reasons then unbeknownst to Petitioners, the District never processed those applications before May 29, 1979. Later on, the reasons became clear. There had been an election in 1978, leading to a new administration that took control in January 1979, with a strong adverse feeling toward, and policy against, conversions. The new administration reorganized the condominium office and moved it closer to the seat of power. Only by exhaustive discovery, going through voluminous files of the District, did Petitioners chance upon a March 12, 1979 memorandum of an official in the District's office handling conversions. That memo recommended that no new "high rent" applications for a C/E or C/Ex be processed for sixty days, and that most of the then pending applications be delayed as well. As it turned out, this is exactly what happened; from March 15 to May

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[4] See fn. 3, *supra*. The Second Emergency Cooperative Regulation Act of 1979, E.A. 3-37, was effective on May 4, 1979; the first page of that Act is reprinted in Appendix F at App. 91a.

[5] Although the Emergency Act of May 4, 1979 was signed on May 4, 1979, the District extended it retroactively to April 25, 1979.

29, 1979, no new applications (including Petitioners' of April 25, 1979) were processed, and most of the pending applications were also untouched, all as corroborated by the District's logs. On May 29, 1979, the District, by emergency Act, banned "high rent" conversions.[6] Having delayed Petitioners until May 29, 1979, the District then refused to process the applications on the grounds that they were barred by the new law. By inaction, the District's Executive quietly and effectively voided the pre-May 29, 1979 legislative rights of Petitioners. The District's insistence on a procedural condition to conversion, coupled with its refusal to implement that application procedure, was its second illegality, for it rendered the statutory rights a nullity.

During the time period pertinent to this petition, the District's Home Rule Act required legislation to go through Congress before becoming effective; an exception was the District's right to enact emergency Acts for 90 days. D.C. Code § 1-233(c)(1) (1981 Ed.), previously codified as D.C. Code § 1-146(a) and § 1-147(c)(1) (1979 Ed.). The District's Corporation Counsel had advised the District that it could not enact successive emergency Acts since, to do so, would undermine the Home Rule requirement of Congressional approval of permanent legislation. Notwithstanding this, the District successively reenacted, as emergency Acts, the May 29, 1979 ban on "high rent" conversions. Its successive reenactment on August 27, 1979[7] was accordingly held to be illegal by the Superior Court in *Washington Home Ownership Council v. District of Columbia*, No. 10624-79 (D.C. Super. Ct. October 19, 1979). Despite the decision in October 1979, the District continued to reenact the same emergency laws

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[6] The Emergency Condominium and Cooperative Stabilization Act of 1979, E.A. 3-44, is reprinted in pertinent part in Appendix G (App. 92a-93a).

[7] Emergency Condominium and Cooperative Stabilization Act of 1979, E.A. 3-95 (August 27, 1979).

on November 23, 1979[8] and February 20, 1980.[9] The Superior Court's decision, invalidating the District's successive reenactments of emergency laws, was affirmed by the Court of Appeals of the District of Columbia on May 28, 1980. *See District of Columbia v. Washington Home Ownership Council*, 415 A.2d 1349, 1359-1360 (D.C. 1980) (*en banc*). During the period of these illegal successive emergency moratoria, the District, on the basis of those illegal Acts, refused to permit conversion of "high rent" buildings, including Van Ness South, and this was the District's third illegality.

Although the illegal moratoria precluded "high rent" conversions, they did not preclude conversion if a majority of *all* tenants agreed. Petitioners, on May 22, 1980, executed a contract to sell Van Ness South to the tenants, conditioned on conversion. A majority of the tenants had voted on May 20, 1980 to buy the building, subject to the right to convert. On May 23, 1980, the tenants met with the appropriate District officials to work out a procedure for reflecting the tenants' consent to conversion. The District approved a specific and non-notarized form to be used for this purpose. The tenants shortly thereafter posted purchase money deposits totaling $2,218,457. To effect the purchase and ultimate conversion, the tenants, through their association, used the very forms the District had approved, and they obtained the signed consents of a majority of the tenants, thereby entitling the tenants to convert as a matter of law.

Armed with majority consent, the tenants, on June 17, 1980, filed an application for a C/E, and on June 23, 1980, filed an application for a C/Ex, but once again, they were not processed. On July 28, 1980, the tenants

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[8] Condominium and Cooperative Conversion Stabilization Emergency Act of 1979, E.A. 3-132 (November 23, 1979).

[9] Condominium and Cooperative Stabilization Emergency Act of 1980, E.A. 3-151 (February 20, 1980).

filed their application for registration, but this was not processed either. The tenants, through their counsel, complained to the District about this delay and inaction. As of August 1980, the District had, in process, yet another emergency Act which would eliminate not only "high rent" conversions, but also conversions based on the consent of a majority of all tenants. That emergency legislation was signed, and became effective, on Sunday, August 10, 1980.[10]

Obviously aware of this imminent emergency Act, the District waited until the afternoon of Thursday, August 7, 1980 to take its final step to foil this latest attempt to convert. On August 7, the District advised that it would not accept the tenant consent forms which the District had already approved on May 23, 1980. Instead, the District advised that unless each consent was separately and independently confirmed, the signed consent would be deemed to be a refusal to consent. Such a condition had never before been publicly announced or known to Petitioners or the tenants. It was a renege on the part of the District, pulling the rug out from under the tenants who, like Petitioners, had relied for months on the law as written and on the express agreement with the District as to the procedure and form to be used and accepted to show the requisite tenant consent.[11]

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[10] Rental Housing Conversion and Sale Emergency Act of 1980, E.A. 3-248 (August 10, 1980). This was replaced, in identical substance, by the September 10, 1980 Rental Housing Conversion and Sale Act of 1980, D.C. Law 3-86, 45 D.C. Code § 1601 *et seq.* (1981), portions of which are quoted *supra* under "Statutes Involved."

[11] While Petitioners do not deny the District's right to check with tenants as to their consents, this is not the same thing as treating a consent as a non-consent when the independent confirmation cannot later be made. The operative District official testified that the District would not convert a consent into a non-consent, merely because the consent was not verified. Ironically the District in fact did what that official said it would not do; and, to Peti-

Faced with a Herculean task, the tenants followed up on Friday, August 8, 1979, and by that evening had obtained the requisite independent confirmations of the pre-existing majority consents, but it was after 5:00 p.m. Although there were appropriate officials at the District's offices after hours on Friday, August 8, they refused to treat the confirmations as valid because the District's work day had come to a close. The confirmations were delivered again on Saturday, August 9, but were given the same rejection. Since these confirmations were merely corroborative of the majority consent which existed before August 8, there was no justification for the District to refuse to acknowledge, on Friday evening, what previously existed. Although the District said it could not officially act after hours or on the weekend to accept confirmations (which it had no right to demand anyway), it nevertheless insists that it could act on Sunday, August 10, to give effect to the emergency Act that not only voided the tenant election eligibility of Van Ness South, but which also required substantial fees to be paid to the District if the conversion of Van Ness South had to be done under this new 1980 legislation. The District, of course, refused to recognize the tenants' pre-August 10, 1980 right to convert, and it insisted that Petitioners and the tenants start all over, under the new law of August 10, 1980 and its identical successor, the permanent Act of September 10, 1980. The illegal requirement of an independent verification, coupled with the District's belated announcement and inveterate refusal to accept what it illegally required, all with the effect of delaying the conversion until the advent of the new law, constitute the District's fourth illegality.

In sum, the District (1) required a C/Ex between April 25 and May 4, 1979 when it had no right to do so,

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tioners' frustration, the Court below failed to address the propriety of this very reversal of an agreement and published law.

(2) delayed processing "high rent" applications while it, with an anti-conversion animus, drove toward an emergency Act that would annul such applications, (3) repeatedly passed illegal emergency Acts, under which it refused to allow "high rent" conversions, and (4) totally undermined the legitimate rights of the tenants to buy the building and convert. Since then, the District's position has been that Petitioners' only recourse is to comply with the 1980 legislation, which is still in effect, including its election or delegation provisions which a Panel of the District of Columbia Court of Appeals has held to be unconstitutional. After the August 10, 1980 Act became effective, the tenants opted to rescind the contract, as was their right, and Petitioners lost that sale, as well as their contract to sell to a third party (one of the original plaintiffs below) whose contract was also conditioned on conversion.

C. August 10, 1980 to the Present

As noted, the emergency Act of August 10, 1980[12] was replaced by an identical permanent Act effective September 10, 1980.[13] Under this law, there can be no conversion unless, at a formal election, a majority of the tenants who are eligible to vote, approve the conversion. This is different from the prior "tenant consent" conversions. Under the new and currently prevailing law, certain tenants (*e.g.*, those given lifetime tenancies by the Act, plus others) are not eligible to vote. Since the eligible voters are less than all, and since fifty percent of the eligible voters can block a conversion, this leaves the decision in the hands of a minority of tenants who, by voting "no" for whatever reason, can override the wishes of even a majority of the tenants. In other words,

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[12] Rental Housing Conversion and Sale Emergency Act of 1980, E.A. 3-248 (August 10, 1980).

[13] Rental Housing Conversion and Sale Act of 1980, D.C. Law 3-86, 45 D.C. Code § 1601 *et seq.* (1981).

the ultimate use of private property is delegated to a small private minority. The intervenor is such a group.

It is this delegation of power which has been held unconstitutional by this Court, but which has given rise to conflicts among Courts, as noted *infra*.

Federal jurisdiction in the District Court below was based on 28 U.S.C. §§ 1331, 1343.

REASONS FOR GRANTING THE PETITION

I. ISSUE I—DELEGATION OF CONTROL TO TENANTS

A. Conflict In Opinions

There is, at present, an absolute and irreconcilable conflict between the May 3, 1988 Opinion, Decision and Order of the Panel of the Court below (App. A), and the September 11, 1987 Panel's Opinion [now under *en banc* consideration] of the District of Columbia Court of Appeals in *Hornstein v. Barry*, 530 A.2d 1177 (D.C. 1987), reprinted in Appendix D (App. 65a-82a).[14] If that decision is confirmed and reinstated by the full Court, the effect is that litigants will face diametrically opposed results depending upon whether their case is brought in the United States District Court or in the District of Columbia Superior Court.

Compounding the problem of a conflict of views within the District of Columbia is an element of confusion within the very Court below. The Panel's decision of the

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[14] On February 19, 1988, the District of Columbia Court of Appeals vacated the September 11, 1987, opinion and judgment and granted a rehearing *en banc*. *Hornstein v. Barry*, 537 A.2d 1131 (D.C. 1988). This rehearing was held on September 7, 1988. On September 8, 1988, that Court, *sua sponte*, ordered that supplemental Briefs be filed on the question of what the effect on the remainder of the conversion laws would be if the "delegation" provisions were held to be unconstitutional, in effect, if the decision of the Panel were to be affirmed. Appellants' Brief was filed on September 23, 1988. The District of Columbia has requested an extension for filing its Brief.

Court below utilizes a rationale, as well as reaches a result, in direct conflict with that of the above noted Panel of the District of Columbia Court of Appeals in *Hornstein*. When, in the case at bar, the full Court below denied Petitioners' Motion for an *en banc* Rehearing, Judge Silberman of that Court, who had not sat on the original Panel, undertook to write an opinion explaining his agreement with the result reached by the Panel; however, in so doing, he disagreed with the Panel's reasoning, which disagreement goes to the heart of the Panel's decision. Hence, we have seen two different results (between the two Courts) and three different rationales (two within the Court below) for deciding the identical issue in this one jurisdiction.

The Panel in the *Hornstein* case also acknowledged the existence of a conflict among the decisions of the highest courts of a number of states. (App. 76a). Hence, even if the decisions or opinions within the District of Columbia were consistent, there would still remain a conflict between or among a number of jurisdictions.

B. Source of Disagreement and Confusion

This ongoing disagreement and uncertainty stem from the following decisions of this Court: *Eubank v. City of Richmond*, 226 U.S. 137 (1912); *Cusack Co. v. City of Chicago*, 242 U.S. 526 (1917); *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928); and *City of Eastlake v. Forest City Enterprises*, 426 U.S. 668 (1976). The difficulties flowing from these four cases can best be shown by the opinion of the District of Columbia Court of Appeals in *Hornstein* which stated, *inter alia*: (1) that an analysis of these cases (discussing the propriety of legislation contingent upon the approval of private individuals) "reveals a fine and often confusing dividing line between constitutional and unconstitutional delegation" (App. 74a); that the decisions in *Eubank*, *Cusack* and *Roberge* "are not easy to recon-

cile" (App. 76a); and that there is a question as to "whatever vitality" remains in *Cusack* in light of *Roberge* and this Court's distinction and discussion in *City of Eastlake* (App. 78a).

Similarly, Judge Silberman, in his separate Opinion, below, stated, in disagreeing with his own Court's analysis, *inter alia*: "the three Supreme Court cases [*i.e.*, *Eubank*, *Cusack* and *Roberge*] which seem so difficult to reconcile—and which troubled both the panel of this court and our colleagues across the street—are explainable in my view only if one focuses on the property interests which the ordinances furthered rather than the consent procedure employed." (App. 36a). After discussing *Eubank*, Judge Silberman then characterized the Supreme Court as having "zigged" five years later in *Cusack*; Judge Silberman proceeded to analyze the opinions in *Cusack* and *Roberge* as meaning something other than what they expressed (App. 36a-37a); and he lastly characterized this Court's handling of these three cases as having "misleadingly treated them as if the voting process was constitutionally significant." (App. 38a). If, as Judge Silberman noted, this Court has not only "zigged" but has also used language which is "misleading" as to what its decisions really mean, this is all the more reason why this Court should use the case at bar finally to clarify the law and resolve the conflicts which have arisen within and without the District of Columbia.

C. Importance

The ability to engage in land use planning, including restrictions thereon in order to satisfy countervailing rights, is a nationwide question. While the decision as to a delegation of power to a small group of private citizens may arise in many contexts, the national situation regarding the need for housing will continue to press the limits of control and governance. State and local authorities should not be in a position of governing by abdica-

tion, leaving land use decisions to private citizens—rather than exercising accountable authority through governmental and reasonable processes geared toward the interests of the public as a whole.

II. ISSUE II—STANDARD FOR 42 U.S.C. § 1983

A. Conflict

The Panel in the case at bar noted that some, but not all, violations of law by the District of Columbia (or by states or their local governments) rise to the level of a federal violation, namely of 42 U.S.C. § 1983; and while recognizing that "Courts must strike a careful balance in applying the protections of the Civil Rights Acts," the Panel stated as follows: "[t]he Supreme Court has not enunciated a standard by which to determine precisely hich state lapses constitute substantive due process violations under 42 U.S.C. § 1983. Nor has the Circuit yet addressed the issue." (App. 13a).

Faced with a lack of a standard mandated by this Court, the Panel adopted for the District of Columbia, as a matter of first impression for it, the standard announced by the First Circuit in *Roy v. City of Augusta*, 712 F.2d 1517 (1st Cir. 1983), namely that the state or local governmental error had to be due to a "deliberate disregard of the state's fundamental process." (App. 13a). At no time did the Panel below either mention or address the differing or seemingly differing opinions of the other Circuits which have not required a showing of deliberate animus.[15] Since, as a matter of first im-

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[15] *See, e.g., Bello v. Walker*, 840 F.2d 1124 (3d Cir. 1988); *Littlefield v. City of Afton*, 785 F.2d 596 (8th Cir. 1986); *Sullivan v. Town of Salem*, 805 F.2d 81 (2d Cir. 1986); *Southern Cooperative Development Fund v. Driggers*, 696 F.2d 1347 (11th Cir. 1983), *cert. denied*, 463 U.S. 1208 (1983); *Scudder v. Town of Greendale*, 704 F.2d 999 (7th Cir. 1983); *Shelton v. City of College Station*, 780 F.2d 475 (5th Cir. 1985), *cert. denied*, 477 U.S. 905 (1986) and *cert. denied, City of College Station v. Shelton*, 479 U.S.

pression in the District of Columbia, the Court below has joined the First Circuit in establishing a § 1983 standard which has not been mandated by this Court and which is inconsistent with the standard elsewhere, the case at bar is an appropriate vehicle to resolve the conflict.

B. Ambiguity and Practical Difficulty of the Standard Employed Below

After reciting and adopting the First Circuit's decision in *Roy*, the Court below left even its own standard in an ambiguous state. As a gloss on the above noted formulation, the Court below went on to require a showing of "grave unfairness," terms which are patently unclear and a condition that can exist without deliberate animus. It further elaborated by stating that, in addition to the deliberate flouting of the law, the violation must be one that "trammels significant personal or property rights." (App. 13a). Lastly, citing *Ortega Cabrera v. Municipality of Bayamon*, 562 F.2d 91, 103 (1st Cir. 1977), it alluded to the need for "purposeful, malicious action." (App. 14a).

This spate of descriptive terminology obscures the standard rather than clarifies it. What, we may ask, is a "trammeling"; what is "grave"; when is a violation a "flouting"; when is a statutory property right not "fundamental"; is a "fundamental process" the same as a fundamental right? Such a "standard" is really no meaningful standard at all; instead, it is an invitation to litigation to give meaning to such terms. It is a trial lawyer's nightmare in trying to determine what has to

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822 (1986). These have not required personal or group animus or deliberate illegality, but have used a test of whether the conduct was arbitrary, capricious or of like kind, short of showing a deliberate animus. *See also Scott v. Greenville County*, 716 F.2d 1409 (4th Cir. 1983), and *Wilkerson v. Johnson*, 699 F.2d 325 (6th Cir. 1983), leaving some doubt as to the standard.

be proved; and it is a litigant's nightmare in trying to predict what might be the outcome. As Kenneth Culp Davis stated in his *Administrative Law Treatise* 2d Ed., Vol. 5 (1984) at p. 240:

> That appellate litigation under § 1983 is nearly ten times as much as appellate litigation under the FTCA [Federal Tort Claims Act] may be largely because courts that are unguided by the clear lines of a statute are usually unable to produce clear laws.

Nor is it realistic to predicate a standard on requiring a victim of an unquestioned illegality to prove the inner recesses of the minds of all governmental officials who may have had involvement in the matter. Such officials may be unreachable; admission of impropriety is seldom documented; and the ability to paper over, or rationalize, a course of conduct is extreme. The test should be predicated upon an evaluation of the result, as the other Circuits seem to have done, to determine whether the conduct is so far from the legal norm as to be arbitrary or capricious. This element of objectivity may not create precision, but it at least would make the task more manageable and result more predictable.

In view of the conflict among Circuits and the formlessness of the standard adopted below, this case presents both the need and opportunity for establishing a disciplined and workable test to resolve what are the clearly conflicting interests of private rights and governmental leeway.

CONCLUSION

A writ of certiorari should issue to the Court of Appeals for the District of Columbia Circuit to review its May 3, 1988 decision and judgment as to (1) the constitutionality of the delegation provisions of the Rental Housing Conversion and Sale Act of 1980, D.C. Law 3-86, 45 D.C. Code § 1601 *et seq.* (1981 Ed.), and (2) the standard to be used in determining whether an illegality, committed by a non-federal governmental entity, constitutes a violation of 42 U.S.C. § 1983.

Respectfully submitted,

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October 12, 1988

APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-7037

ROBERT I. SILVERMAN, *et al.*,
Appellants

v.

MARION BARRY, Mayor of the District of Columbia, *et al.*

Appeal from the United States District Court
for the District of Columbia

Argued September 10, 1987

Decided May 3, 1988

Burton A. Schwalb, for appellants.

Lutz Alexander Prager, Assistant Deputy Corporation Counsel, with whom *Frederick D. Cooke, Jr.*, Acting Corporation Counsel, and *Charles L. Reischel*, Deputy Corporation Counsel, were on the brief for appellees, Barry, Mayor of the District of Columbia, et al.

Lynne Bernabei, for appellee, The Group to Save Van Ness South for Everybody, Inc.

Before: WALD, *Chief Judge*, MIKVA and EDWARDS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* MIKVA.

MIKVA, *Circuit Judge*: Appellants in this case are suing the District of Columbia for denying them per-

mission to convert a rental apartment building they own to cooperative or condominium apartments. They bring both constitutional and statutory claims, and challenge both the District's actions and the conversion statutes under which it acted. Appellants seek damages in the amount of the difference between the price they sold the building for, and the price they could have obtained had they been permitted to convert it.

Appellants are the sole general partners in a limited partnership that owned Van Ness South, an apartment building in the Northwest section of Washington, D.C. In 1979 and 1980, they attempted without success to convert the building to cooperative or condominium apartments. Eventually, they sold the still-unconverted building and filed suit in U.S. District Court alleging that they had been illegally prevented from converting it. They contended in the suit that in denying them permission to convert the building, the District of Columbia deprived them of due process and equal protection of the law in violation of the Fifth Amendment. In addition, appellants challenged the statutes regulating conversion as violating the Due Process Clause of the Fifth Amendment and the D.C. Home Rule Act.

The district court held that neither the District's actions nor the statutes under which it acted violated appellants' rights to due process or equal protection. It also found the claim under the D.C. Home Rule Act to be without merit. We affirm that decision.

I. BACKGROUND

Appellants are the sole general partners in Van Ness Properties III, a District of Columbia limited partnership. The partnership built and owned a 625-unit apartment building known as Van Ness South, located at 3003 Van Ness Street, in Northwest Washington. Appellants bring this suit against the District of Columbia, the

District's Department of Housing and Community Development (DHCD), and three officers of the District, including the Mayor. Appellee-intervenor, Group to Save Van Ness South for Everybody, Inc., is a tenant group organized in 1980 and incorporated in 1981 for the purpose of maintaining Van Ness South as rental property.

This case marks *Silverman v. Barry*'s second appearance on the docket of this court. Filed initially in the D.C. District Court, the suit was dismissed by that court for want of jurisdiction. That decision was overturned on appeal by this court, and the case was remanded to the district court for trial. *See Silverman v. Barry*, 727 F.2d 1121 (D.C. Cir. 1984). The district court then heard the case on the merits and dismissed with prejudice. *Silverman v. Barry*, No. 81-0394 (D.D.C. Filed Aug. 22, 1986) (Findings of Fact and Conclusions of Law). Appellants appeal from that decision.

A. *District Regulation of Conversions*

The District of Columbia has long regulated the conversion of rental property to cooperatives and condominiums. The regulation of condominium conversion within the District began with the Condominium Act of 1976 which restricted condominium conversions to buildings that were "high rent" according to a statutory formula, that had a threshold vacancy rate, or in which a majority of the tenants consented to conversion. D.C. Law 1-89, *codified in* D.C. Code §§ 5-1201 et seq. (1978 Supp.). That statute, with changes not material to this case, remained in effect until May 29, 1979, when the District's moratorium on "high rent" conversions began. As of April 1979, condominium conversions were begun by filing condominium instruments with the Recorder of Deeds. District regulations required the applicant then to obtain a Certificate of Eligibility (C/E) from the District.

The regulation of cooperative conversions within the District dates back considerably earlier. Since 1940, the

District of Columbia Cooperative Association Act has required building owners to file articles of incorporation to convert a building to a condominium. *See* D.C. Code §§ 29-801 et seq. (1973). From 1975 to 1979, the District enacted a series of consecutive emergency and non-emergency acts that made it considerably more difficult than previously to convert rental apartments to cooperatives. The first emergency act, in effect from January 25, 1979 to April 25, 1979, prohibited conversion of rental property in the District to cooperatives except that the Mayor could grant an "exemption" in three cases: (i) if fewer than fifty percent of the units in the building were occupied; (ii) if at least 51 percent of the tenants consented to the conversion; or (iii) if the building qualified as "high rent" according to a statutory formula. D.C. Law Act 3-2, Jan. 25, 1979, 25 D.C.R. 7680 (1979). To convert to cooperatives as a "high rent" building, the District, by rule and practice, required the applicant to obtain a Certificate of Exemption ("C/Ex") from the conversion moratorium. Before issuing a "high rent" C/Ex or C/E, DHCD verified that the rents in the application exceeded the statutory minimums necessary to qualify for "high rent."

The emergency acts regulating cooperative conversions were passed by the District in smooth succession with one exception: the seventh reenactment of the emergency act expired on April 25, 1979, and the eighth did not become effective until May 4, 1979. A nine-day gap was thus created during which a building in the District could be converted to cooperatives by the owner simply filing articles of incorporation with the Recorder of Deeds. Even during the gap, however, the DHCD took the position that an owner had to obtain a C/Ex before it would approve a cooperative conversion. (Although a nine-day gap existed in the regulation of cooperatives, appellants' application was pending for only six business day. Appellants filed their application on the second day of the

gap, April 26, and two of the nine days were weekend days, on which the DHCD office was closed.)

On May 29, 1979, the District enacted a moratorium on "high rent" cooperative and condominium conversions. The Emergency Condominium and Cooperative Stabilization Act of 1979 prohibited the District from issuing any high rent C/E's or C/Ex's. D.C. Act 3-44, 26 D.C.R. 10363 (1979). The original Act lasted 90 days, but it was followed by three similar 90-day emergency acts, D.C. Act 3-95, 26 D.C.R. 1014 (1979); D.C. Act 3-132, 26 D.C.R. 2436 (1979); D.C. Act 3-151, 27 D.C.R. 849 (1980), and on February 23, 1980 by an emergency act which went into effect for 180 days. Condominium and Cooperative Conversion Stabilization Act of 1979, D.C. Law 3-53, 27 D.C.R. 37, 958 (1980). These moratoria, directed at high-rent conversions, did not affect conversions based on tenant-consent procedures or on vacancies.

On October 19, 1979, the D.C. Superior Court held that the District's practice of enacting successive emergency acts instead of passing permanent legislation violated the District of Columbia Self-Government and Government Reorganization Act, P.L. 93-198, 1 D.C. Code §§ 121 et seq., as amended (1979 Supp.) ("Home Rule Act"). The court enjoined enforcement of the emergency act then in effect governing cooperative and condominium conversions. *Washington Home Ownership Council, Inc. v. District of Columbia*, No. 10624-79 (D.C. Sup. Ct. Oct. 19, 1979). On October 22, the District of Columbia Court of Appeals stayed the Superior Court order. *District of Columbia v. Washington Home Ownership Council, Inc.*, 415 A.2d 1349, 1350 n.4 (1980) (en banc). During the pendency of the appeal, the District continued to pass emergency acts that imposed the same restrictions on conversion to cooperatives and condominiums that the previous acts had.

On May 28, 1980, the Court of Appeals sitting *en banc* affirmed the Superior Court's holding, but stayed enforce-

ment of its decision for 90 days to provide the District "an appropriate interval in which to deal with its emergency legislation," *id.* at 1360, and remanded the case. On December 3, 1980, the Superior Court ruled on remand that its decision would be prospective only. As a result, the emergency acts passed prior to August 28, 1980—the date on which the Court of Appeals mandate issued—remained valid law. *Washington Home Ownership Council, Inc. v. District of Columbia*, No. 10624-79 (D.C. Sup. Ct. Dec. 3, 1980).

Before the Court of Appeals mandate issued, on August 10, 1980, the Mayor signed into law the Rental Housing Conversion and Sale Emergency Act of 1980, which was enacted for 90 days as emergency legislation. D.C. Act 3-248, 27 D.C.R. 3954 (1980). It was, in the wake of the decision in *Washington Home Ownership Council*, the last emergency act that the District could pass governing conversions. In September, the August 10 emergency act was superseded by a permanent District law, the Rental Housing Conversion and Sale Act of 1980. D.C. Law 3-86, D.C. Code §§ 45-1601 et seq. (1981). The 1980 Act required tenant consent as a prerequisite to conversion of rental property in the District. To be approved, a plan to convert had to receive the votes of over 50 percent of qualified voters in a conversion election.

The application to convert Van Ness South was filed against the backdrop of a recent change in mayoral administrations. On January 1, 1979, Mayor Marion Barry took office. Mayor Barry appointed Robert L. Moore the new Director of DHCD. The record indicates that Moore may have believed that condominium and cooperative conversions in the District were occurring too rapidly. *Silverman v. Barry*, Findings of Fact ¶ 12. Shortly after his appointment, Moore transferred the administration of cooperative and condominium conversions from the Neighborhood Improvement Administration to his

own office. Appellants contend that this transfer marked the start of a concerted effort to stymie conversions until a moratorium could be enacted. In particular, they point to a memorandum written to Moore by a DHCD officer, Maria L. Johnson, recommending ways to restrict conversions by administrative means, which included the suggestion that housing conversions could be delayed administratively for as long as 60 days.

Conversion applications were granted slowly during the first half of 1979. Between March 12, 1979 and May 29, 1979 no new high rent or tenant consent application for a C/E or C/Ex filed after March 12, 1979 was acted upon. Findings of Fact ¶ 15. The DHCD did, however, continue to grant C/E's and C/Ex's during this time. When the Van Ness South application was filed, DHCD records show that more than 60 applications were on file. The district court found that the applications were handled in roughly chronological order. DHCD records show that a number of the pending applications were approved for cooperative or condominium conversion, and that those approved were not all for small buildings. Among them were a 315-unit condominium conversion approved on May 15, 1979, and a 290-unit cooperative conversion approved on April 11, 1979.

B. *The Van Ness South Application*

On April 26, 1979, appellants filed applications with the District for a C/E to convert Van Ness South to cooperatives and for a C/Ex to convert condominiums under the "high rent" provision of the Condominium Act of 1976. Appellants' applications were notarized, and contained the information required by the statutes, including information on rents to substantiate the claim of eligibility for high-rent condominium conversion. Appellants applied for a C/E as part of their condominium application. In addition, although the application was made during the nine-day gap between cooperative con-

version statutes, appellants nevertheless applied for a C/Ex, because they contend that the District continued to require one.

The District had not acted on appellants' applications by May 4, the end of the nine-day statutory gap. The district court, noting that more than 60 conversion applications were on file at the time, concluded that it appeared that Van Ness South was not granted a C/E during the nine-day gap because of the volume of applications pending before the DHCD. *Silverman v. Barry*, Findings of Fact ¶ 13. On May 4, 1979, the eighth reenactment of the Emergency Cooperative Regulation Act of 1979 went into effect. Like those that preceded it, the May 4 law imposed a general prohibition on cooperative conversions, except that the Mayor was authorized to grant exceptions in three cases: buildings with over a 50% vacancy rate, buildings in which a majority of tenants approved the conversion in writing, and buildings that were "high rent" according to a statutory formula. D.C. Act 3-37, 26 D.C.R. 9918 (1979).

The DHCD still had not acted on the Van Ness South application by May 29, when the District enacted the first of several acts that restricted conversions still further. The Emergency Condominium and Cooperative Stabilization Act of 1979 eliminated the "high rent" exception to the ban on cooperative and condominium conversions. That act was followed by several successive emergency acts that continued the prohibition on "high rent" conversions. As long as these prohibitions remained in effect, the only route for conversion of Van Ness South was a tenant consent conversion.

In early 1980, appellants entered into a contract to sell Van Ness South, on the assumption that it would ultimately be permitted to convert. On January 28, 1980, they contracted with The Investment Group Development Corporation ("The Investment Group") to sell the Van Ness South building and the land on which it was built

for $40,130,000.00. The contract was terminable, however, if a C/E or C/Ex were not granted for the building within a certain amount of time, or if the Superior Court's decision in *Washington Home Ownership Council* were overturned. On February 20, 1980, appellants informed the Van Ness South tenants of their intent to sell, gave notice of their intent to convert, and, as required by District law, offered to sell the property instead to a corporation comprised of Van Ness South tenants. On May 20, 1980, the Van Ness South Tenants Association ("VNSTA") approved by majority vote a purchase of the building on the terms offered to the Investment Group, for conversion to condominiums or cooperatives. Two days later, VNSTA entered into a contract to purchase the building for $40,130,000.00.

With the contract signed, VNSTA attempted to convert Van Ness South by tenant consent. The Condominium Act of 1976 and District rules required a building owner to file consent forms signed by a majority of the heads of households in a building. D.C. Code § 5-1281 (b) (2). On May 23, 1980, prior to distributing consent forms to tenants, VNSTA submitted a sample consent form to DHCD, which gave its advance approval to the form. At the time, DHCD did not indicate that the forms would have to be verified. By June 17, 1979, VNSTA had collected signed consent forms from 319 of the 603 eligible households in Van Ness South consenting to the conversion of the building to condominiums or cooperatives. In apparent possession of a majority, VNSTA filed for a C/E pursuant to the tenant-consent provision of § 5-1281(b) (2). In support of its application, VNSTA submitted its 319 consent forms to DHCD. On June 23, 1980, VNSTA submitted an application for a C/Ex to convert the building to a cooperative, and submitted 10 additional tenant consent forms. Without yet having obtained a C/E, on July 28, 1980 VNSTA submitted its application to convert Van Ness South to a condominium, and included a $23,125 fee.

From June 28 to August 6, on seven separate occasions, consent forms, rescissions of consent, and rescissions of declaration of non-consent for the Van Ness South application were filed with DHCD. On June 28, 1980, the appellee-intervenor, Group to Save Van Ness South for Everybody ("the Group"), submitted 33 rescissions of consent to convert Van Ness South. On July 8, VNSTA submitted eight additional consent forms. On July 25, VNSTA submitted seven more consents, and three days later an additional four. On August 4, VNSTA submitted 17 additional consent forms, five rescissions of declaration of non-consent, and five new consent forms signed by tenants who had previously revoked consent forms that had been filed. On August 5, VNSTA submitted one consent to convert and five rescissions of declaration of non-consent. On August 6, VNSTA submitted one consent to convert.

As a matter of policy, the DHCD did not consider any tenant consent to be valid until it was verified by a member of the DHCD staff. The office verified consents by telephoning residents during regular business hours. If the tenant could not be reached after three telephone calls, the DHCD would attempt to reach him or her by other means, such as leaving messages at the building's front desk, or trying to relay a message through the tenant's association.

The District's regulations governing cooperative and condominium conversions did not state that consent forms had to be confirmed. Nor did DHCD supply applicants with any written notification of the verification requirement. The District considered notarized consent forms to be valid without verification, but the DHCD did not mention notarization when it approved appellants' model consent form. There is, however, no evidence that appellants did not have actual notice of the policy of checking consents. The DHCD had regularly done some checking consents in the past. Until March 1979, how-

ever, it was not DHCD policy to consider consents invalid until verified.

On August 7, 1980, the District notified VNSTA that it did not have enough validated consent forms to convert Van Ness South. Although VNSTA had submitted 344 unrescinded consents, more than a majority of the households in Van Ness South, the DHCD staff had only been able to verify 274 of those consents. On Sunday, August 10, the Rental Housing Conversion and Sale Emergency Act of 1980, D.C. Act 3-248, was signed into law. The Act eliminated tenant-consent conversions, and instead required approval by a majority of heads of households in a tenant election. VNSTA, having learned that notarized consents did not have to be verified, submitted 32 additional notarized consents on Saturday, August 9. The District, however, did not evaluate the materials submitted on that date, maintaining that it had no obligation to work beyond normal business hours verifying consent forms. The August 10 Emergency Act was later made permanent by D.C. Act 3-86, *codified in* D.C. Code §§ 45-1601 et seq.

On October 9, 1980, the DHCD informed VNSTA that its application could not be processed any further due to the new legislation. On October 24, VNSTA requested a hearing on the DHCD's refusal to continue processing its application. In a letter dated December 22, 1980, Robert Moore advised VNSTA that any appeal of DHCD's refusal to issue a C/E became moot as a result of the August 10 law and the succeeding permanent legislation. Moore stated that conversion at that point could only be accomplished through compliance with the tenant election provisions of D.C. Law 3-86.

On November 7, 1980, VNSTA terminated its contract with appellants to buy Van Ness South, citing its inability to convert the building. Appellants sought to convert Van Ness South on their own pursuant to the Rental Housing Conversion Act of 1980. On November

10, 1982, a tenant election was held at Van Ness South to determine whether to convert the building to a condominium. A majority of the voters in the election opposed conversion. In 1984, appellants sold Van Ness South as a rental building for $27,000,000, an amount less than the price it was to receive in its contract with either VNSTA or the Investment Group.

In February 1981, appellants filed suit against the DHCD and several District officials under 42 U.S.C. § 1983, alleging that the District violated their due process and equal protection rights in denying them approval to convert Van Ness South. They also attached a state claim that the District acted illegally because the statutes it relied on violated the Home Rule Act. In addition, appellants contended in the suit that the appellees' actions constituted a taking, a claim they have dropped in this appeal. The district court dismissed the suit, holding that the District had not violated appellants' constitutional rights. Appellants appeal here from that judgment.

II. Discussion

Section 1983 imposes civil liability on one who

> under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws. . . .

42 U.S.C. § 1983. The purposes of the Civil Rights Acts are to obtain compensation for persons whose civil rights have been violated and to prevent the abuse of state power. *Burnett v. Grattan*, 468 U.S. 42, 53 (1984). Courts have not, however, extended the Acts to cover all wrongs committed on the state level. The Supreme Court has long instructed that "[i]t was not intended by the

. . . Civil Rights Acts that all matters formerly within the exclusive cognizance of the states should become matters of national concern." *Snowden v. Hughes*, 321 U.S. 1, 11 (1944).

Courts must strike a careful balance in applying the protections of the Civil Rights Acts. Too restrictive an application risks failing to achieve the Acts' goals of compensation and curbing governmental abuse. Too broad an application risks federalizing too many infractions that are fully remediable in state court. As this court has stated of violations of state electoral processes by state officials, "[i]f official violations of such laws automatically created federal causes of action, a great many cases involving only local issues that were fully remediable under state law would be brought in federal courts." *Grano v. Barry*, 733 F.2d 164, 169 (D.C. Cir. 1984).

The Supreme Court has not enunciated a standard by which to determine precisely which state lapses constitute substantive due process violations under 42 U.S.C. § 1983. Nor has this circuit yet addressed the issue. The First Circuit, however, struck a wise balance in *Roy v. City of Augusta*, 712 F.2d 1517 (1st Cir. 1983), when it stated that a plaintiff suing under § 1983 must "prove that his injury was due not merely to the law's delay and [the government's] errors but to the defendant's *deliberate disregard* of the state's *fundamental* process." *Id.* at 1524 (emphasis added).

To succeed in a § 1983 suit for damages for a substantive due process or equal protection violation, a plaintiff must at least show that state officials are guilty of grave unfairness in the discharge of their legal responsibilities. Only a substantial infringement of state law prompted by personal or group amimus, or a deliberate flouting of the law that trammels significant personal or property rights, qualifies for relief under § 1983. *See*,

e.g., Scott v. Greenville County, 716 F.2d 1409, 1416 (4th Cir. 1983) (stating that "[d]espite the great deference accorded local officials in zoning and land use matters, their decisions and official actions are not exempt from the constitutional command to be free of racial discrimination.") Inadvertent errors, honest mistakes, agency confusion, even negligence in the performance of official duties, do not warrant redress under this statute. *See Ortega Cabrera v. Municipality of Bayamon*, 562 F.2d 91, 103 (1st Cir. 1977) (upholding dismissal of § 1983 equal protection claim because "there has been no showing of the kind of purposeful, malicious action which is a prerequisite to any such damages recovery").

Appellants assert that the District's actions relating to the conversion application of Van Ness South rose to the level of constitutional violations. Appellants' contentions encompass five distinct claims, four constitutional and one statutory. Their constitutional claims center on: (1) the District's failure to approve the conversion application during the nine-day gap from April 25 to May 4, 1979; (2) the District's purported "illegal administrative freeze" in the spring of 1979; (3) the District's failure from June to August 1980 to approve appellants' conversion application based on tenant consent; and (4) the District's reliance on a tenant election procedure that appellants contend constitutes an unconstitutional delegation of governmental authority. Appellants also allege a statutory violation: (5) the District's refusal throughout to permit conversion based on the emergency moratoria later held to be illegal in *Washington Home Ownership Council.*

The district court held that none of these actions by the District rose to the level of constitutional violations. Judge Flannery found that rather than imposing an illegal internal freeze or otherwise violating appellants' due process or equal protection rights, the District was at this time beset by "confusion," which "explains the

slowness in the District's ability to process the applications." *Silverman v. Barry*, Findings of Fact ¶ 28. The court concluded:

> The totality of these events suggests that the District was going through a period during which conversions to cooperative[s] and condominium[s] were to be done differently under D.C. law. While the conduct of the DHCD and the passage of successive emergency acts suggests a protracted effort by the District to deal with the problem of massive conversions, insufficient evidence exists to show the District's actions prior to passage of permanent legislation to be a deprivation of plaintiffs' rights in their property. The acts of the District are discretionary to a point before they become a deprivation of due process: that point was not reached.

Silverman v. Barry, Conclusions of Law ¶ 14. Because we agree with this assessment, we affirm the decision below. In so doing, we do not say that the District's actions were ideal. We hold only that at no point did the District's handling of appellants' application rise to the level of a constitutional violation or violate the Home Rule Act.

A. *The April-May 1979 Statutory Gap*

The first time period at issue in this appeal is the nine-day interval during which cooperative conversions were virtually unregulated in the District as a matter of law. In the nine-day period from April 25 to May 4, 1979, one emergency act regulating cooperative conversions had expired, and the next had not yet been enacted. Although appellants applied to convert Van Ness South to a cooperative on April 26, the District did not act on the application during the gap. Appellants contend that during this time they possessed an absolute right to convert their property, and that the District denied them

their due process rights when it failed to approve the conversion.

The district court found that the District's failure to act during the nine-day interval was due to the fact that this was "an extremely short interim period" during which "it was undoubtedly unclear to DHCD and its personnel what procedures they were operating under." *Silverman v. Barry*, Conclusions of Law ¶ 9. Our deference to the district court's determination is considerable. We must defer to its determination that the DHCD's delay was due to innocent confusion unless we find that holding to be "clearly erroneous." *Cf. Pullman-Standard v. Swint*, 456 U.S. 273, 290 (1982) (stating that "a court of appeals may only reverse a district court's finding on discriminatory intent if it concludes that the finding is clearly erroneous under [Federal] Rule [of Civil Procedure] 52a"). In light of the shortness of the gap and the large number of applications pending, we are unable to conclude that the district court's decision that the DHCD's delay during the statutory gap was a result of confusion over the state of the law is clearly erroneous.

The District was not only justified in proceeding with deliberation and caution on appellants' application, it had an affirmative duty to do so. The law has long shown a special solicitude for the interest of a person in being secure in his or her home. *See, e.g., Payton v. New York*, 445 U.S. 573, 601 (1980) (stating that "the sanctity of the home . . . has been embedded in our traditions since the origins of the Republic"); Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 994 (1982) (discussing the "normative judgment that tenants should be allowed to become attached to places and that the legal system should encourage them to do so"). When a government is asked to approve the commencement of a process that may lead to citizens being evicted from their homes, it must act with the utmost care.

Appellants misperceive the District's role when they maintain that it deprived them of their constitutional rights by not acting more quickly on their application for a C/E during the statutory gap. The DHCD does not exist exclusively to process applications speedily for owners who want to convert buildings; it has a strong countervailing duty to tenants throughout the District to proceed with caution and to grant C/E's and C/Ex's only when it has ascertained that the conversion would be in conformity with the law. The government's obligation to tenants is heightened in an ex parte situation like the instant one. The application for a C/E occurs between the building owner and the DHCD; the tenants are absent from this process and no mechanism exists for them to challenge the application. Because of their strong interest in the outcome of the application, the government has an obligation to the tenants to proceed with sufficient deliberation to ensure that tenants' rights under the law are being protected. The District was justified in acting cautiously during the statutory gap. We affirm the district court's holding on this point.

B. *The Spring of 1979 "Administrative Freeze"*

Appellants' second allegation is that the District imposed an "illegal administrative freeze" in the spring of 1979. Appellants' case that such a freeze existed relies in large part simply on their contention that the DHCD was approving applications too slowly during this time. During the period from March 12, 1979 to May 29, 1979, no new high rent or tenant consent application for a C/E or C/Ex was granted or denied. *Silverman v. Barry*, Findings of Fact ¶ 15. The district court found, however, that the DHCD was handling an unusually large number of applications at this time, and that processing of large and small buildings continued throughout this time. *Id.* The court dismissed appellants' claim, stating that they "had no right to expect conversion per-

mission within such a short period of time." *Silverman v. Barry*, Conclusions of Law ¶ 8.

Appellants present only one significant piece of evidence to suggest that the delay was at all intentional. The mere facts that conversions were an issue in an election campaign or that the government restructured its offices handling conversions provide only the most tangential support for appellants' claim. The only significant evidence they adduce is a single internal DHCD memorandum that they believe indicates the adoption of a departmental freeze. It cannot, however, when looked at in its entirety, support appellants' claim.

The memorandum at issue, dated March 12, 1979, was written by DHCD staff member Maria Johnson to DHCD director Robert Moore. Along with a series of suggestions for new legislation, the memorandum contains the statement that "[a]dministratively, the processing of most of the pending applications and all new applications could immediately be delayed for as long as sixty days." Appellants contend that the memorandum constitutes direct evidence that the District embarked on a program to halt conversions until a moratorium could be enacted.

The Johnson memorandum does appear at first to raise the possibility that DHCD began a slow-down on processing of conversion applications. However, examined in the larger context of the DHCD's entire operation, it is clear that the suggestion was just an isolated suggestion made by a single staff member that was never adopted by the DHCD. The passage to which appellants object was just one of a long list of possible actions that Johnson suggests in her memorandum. It came as part of a specific administrative restructuring suggested in the memorandum:

> 1. Refer all "high rent" applications to the Rental Accommodations Office for a determination of the legality of the rent levels on which we would

> base our determination of condominium conversion eligibility. I discussed this possibilty with Mr. Albert Williams, Deputy Administrator at RAO. He indicated that they would be willing to do this review for us, however it would require an additional auditor to handle our case load. We used to refer these applications to RAO, but discontinued the practice because of excessive delays. If we were to resume the practice immediately, it would delay approvals on those buildings that are eligible for as long as sixty days.

There is no evidence in the record that the DHCD ever adopted the proposal and routed applications through RAO or that it ever stopped processing applications. The record indicates that Johnson's suggestion that the DHCD delay applications was just an idle suggestion by a staff member powerless to implement it on her own and that it was not accepted by DHCD officials in authority. It is not sufficient basis for adopting appellants' theory about an "illegal administrative freeze" or for disturbing the decision below.

C. *June-August 1980*

The next chapter of the Van Ness South saga occurred from June to August 1980, when the Van Ness South Tenants Association attempted to conduct a tenant-consent conversation [sic] of the building. Appellants contend that the District deprived them of their constitutional rights when it denied VNSTA a C/E. The District maintains, however, that it was justified in denying the C/E because it was unable to verify consent forms from a majority of heads of household in Van Ness South before the August 10 moratorium went into effect. The district court found that the "confusion" surrounding the Van Ness South conversion "amply justifies the use of a more accurate method of ascertaining consent," and "explains the slowness in the District's

ability to process the applications." *Silverman v. Barry*, Conclusions of Law ¶ 11. This holding is supported by the record.

Considerable confusion did indeed surround the consent-verification process at Van Ness South. With 603 units, it was one of the larger buildings to submit an application to convert. In addition to the complications created by the sheer number of households in Van Ness South, the verification process was made more difficult by the steady flow of consent forms, rescissions of consent, and rescissions of rescissions into the DHCD office. Miriam Jones, a staff member of DHCD who worked on the verification process, described the confusion that prevailed:

> [W]e were constantly trying to tally the count. I also remember that the tenant association was constantly in touch with us to determine how many people had consented. I also remember that for every day there would be new consents, there would also be retractions of prior consent.

Deposition of Miriam Jones 241. Each time a tenant changed his or her position on conversion, it made more difficult the task of verification, since any prior verification of the tenant's position became worthless.

Two additional sources of confusion over the Van Ness South application were the huge volume of applications for other buildings pending in the DHCD office at the time and the small staff available to perform verifications. Perhaps because owners believed that a moratorium was imminent, perhaps for other reasons, the DHCD was inundated with conversion applications at the time that the Van Ness South application arrived. During an average month the office received approximately 5-8 applications, but during the months the Van Ness South application was pending it received 20-30. Jones stated that it was this increase in the volume of applications

that prevented the office from verifying the Van Ness South consents.

The DHCD staff available to conduct the verification process was extremely small. At no time did more than three individuals work on the consent verification process. One of these staff members, Miriam Jones, was also the director of the office, and had considerable managerial duties to perform. Pamela Payne, the other staff member who did verification work, also served as the office's secretary, and had to devote substantial portions of her day to secretarial work.

A second form of confusion that existed about the Van Ness South application was the confusion that existed not at the DHCD, but among the residents of Van Ness South. The twelve rescissions of consent contained in the record indicate that the atmosphere surrounding the process of obtaining consents was highly charged. One tenant stated in her rescission:

> [T]he man in Apartment No. W-206 (Earl Droessler), who came to my apartment to have me sign a consent, told me that it would be to my advantage to sign. . . . Later, I learned that the D.C. Government had passed a law that would protect the rights of older people so they could keep renting their apartments. I now believe that he had me sign the paper without telling me about my rights under the new law. I think it was very unfair of him not to tell me about the new law before having me sign the consent . . .

Declaration of Bess Eldridge. Another tenant stated that she felt she was "railroaded into conversion. I signed the consent because I didn't know what to do—I was not well informed as I was unable to attend any of the Association meetings because I am a semi-invalid and I only knew what was put under my door." *Declaration of Irene M. Deely.*

The requirement that consents be verified was not contained in the District laws concerning conversions, nor in the regulations promulgated under them. Carol Thompson, special assistant to the director of DHCD, stated that she made the decision that consent forms should be verified. She stated that she thought it was appropriate and within the rules. The record suggests that while the District had verified consents for some time, it was not District policy to reject unconfirmed consents prior to March 1979. *Silverman v. Barry*, Findings of Fact ¶ 29. Nevertheless, there is no evidence that the decision to begin verifying consents was anything other than a simple attempt to ensure that the conversion laws were properly enforced.

DHCD's concerns about the validity and sincerity of consent forms were well-founded and recognized by the conversion legislation. The Condominium Act of 1976, in describing the tenant consent conversion, explicitly expresses concern about the possibility that consents might be improperly obtained. It states that "[n]o landlord or declarant shall use any means whatsoever to coerce any person into signing such an agreement." D.C. Law 1-89, D.C. Code § 5-1281(b)(2). The evidence adduced by appellees that some Van Ness tenants signed consent forms under coercion, or in confusion about the effect of their consents, supports the District's determination that a verification process was necessary. The record indicates that it was not begun out of whimsy or bad motives, but rather out of a concern that District residents not lose their homes through conversions done without the required number of valid consents. With the limited resources at its command, the DHCD's decision to verify consents by telephone as it did was a reasonable means of achieving this end.

An additional reason that the verification procedure was justified is that, unlike many other administrative procedures, an application to convert did not culminate in

an adversarial hearing of any kind. Nor did the statute provide a mechanism for tenants who might lose their apartments to check on their own that the consent forms had been properly obtained. The onus was entirely on the District to ensure that the statutory requirements were met. The District owed a responsibility to those who opposed and might be harmed by conversion of their building to ensure that the consent forms it received were valid, and that they were obtained without coercion.

Given that the telephone verification procedure was reasonable, appellants' remaining objection is one of speed. Appellants had no due process right, however, to have their application acted upon before the onset of the August 10 moratorium. This court has stated that where a statute does not set a specific time limit for administrative action, governmental delay does not constitute a denial of due process merely because statutory rights have been lost in the interim. In *Givens v. United States Railroad Retirement Board*, 720 F.2d 196 (D.C. Cir. 1983), this court considered the claim of a petitioner who was denied certain benefits under the Railroad Retirement Act of 1974, 45 U.S.C. §§ 231 et seq., because § 3(h)(6) of the Act required that his entitlement to such benefits had to be determined prior to August 13, 1981, and the U.S. Railroad Retirement Board ("the Board") did not act on his appeal in that time. *Id.* at 199. The court noted that neither § 3(h)(6) nor any other statute imposed a time limit by which the Board was required to act:

> Section 3(h)(6) only provides that in order to receive dual benefits, an individual must have been determined prior to August 13, 1981, to be entitled to such benefits. Thus, section 3(h)(6) does not provide petitioner with a due process right to have had his entitlement determined prior to the cutoff date. Therefore, there was no procedure or process denied petitioner which was due him.

Id. at 201. As in *Givens*, the mere fact that a statutorily advantageous era was coming to a close did not invest in appellants a right to prompt resolution of their application.

The *Givens* court appeared to suggest that an extraordinarily long delay in governmental action could become "so unreasonable as to violate due process." *Id.* (*citing Kelly v. Railroad Retirement Board*, 625 F.2d 486 (3d Cir. 1980), in which a three year and nine month delay in processing a disability claim without a valid reason was held to be a due process violation). But we do not reach that question today. Appellants did not submit their first consent forms to the District until June 17, 1980, and continued to submit additional forms intermittently until August 6, the day before the last business day before the conversion moratorium became law. The pace at which the District acted does not begin to approach the extreme delay that occurred in the *Kelly* case. Moreover, appellee has shown that the office in question was particularly overburdened in the time period at issue in this suit. We cannot ignore the practical constraints that operate on a government office of this sort. *Cf. Wright v. Califano*, 587 F.2d 345, 356 (7th Cir. 1978) ("[W]e are not justified in sanctioning the imposition of unrealistic and arbitrary time limitations on an agency which for good faith and unarbitrary reasons has amply demonstrated its present inability to comply.") Appellants may have shown that the District should reevaluate the staffing of DHCD; they have not shown that a deprivation of due process or equal protection occurred.

D. *The Home Rule Act Claim*

Appellants also challenge the District's reliance upon emergency acts later held by the Superior Court of the District of Columbia to have been passed in violation of the D.C. Home Rule Act. In *Washington Home Owner-*

ship Council v. District of Columbia, No. 10624-79 (D.C. Sup. Ct. Oct. 19, 1979), the D.C. Superior Court held that the D.C. City Council had exceeded its authority under the Home Rule Act and Government Reorganization Act by enacting successive identical emergency acts, and enjoined their enforcement. When the case reached him again on remand, Judge Revercomb held that his decision would not be applied retroactively. The court held that "all successive, substantially similar [emergency] statutes passed . . . prior to August 28, 1980 were of full force and effect until August 28, 1980 . . ." *Washington Home Ownership Council, Inc. v. District of Columbia*, No. 10624-79, slip op. at 17 (D.C. Sup. Ct. Dec. 3, 1980).

Appellants contend that because Judge Revercomb's order that his decision not be applied retroactively is not binding upon this case as a matter of res judicata, the district court should have applied his decision retroactively to invalidate the emergency acts under which the District acted in this case. Although Judge Revercomb's decision about retroactivity is not binding on this court, we find that the reasoning he used to reach it applies equally to this case. Judge Revercomb concluded that

> retroactive application of the October 19, 1979 Order would seriously disrupt the settled expectations of the District of Columbia and of those persons who have relied on the District's successive emergency legislation as substantive rules of decision, and . . . [that] retroactive application of the [O]rder would cause substantial hardship without compelling benefit . . .

Id. 16. We see no reason that this analysis does not apply equally to the instant case, and decline to upset the district court's decision not to apply *Washington Home Ownership Council* retroactively.

The Supreme Court has long held that decisions about retroactive effect do not implicate constitutional rights.

See Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 364 (1932) (stating that "the federal constitution has no voice upon the subject."). The Court has, however, enumerated three factors for courts to consider in making determinations about retroactivity. *See Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971); *see also Common Cause v. Federal Election Commission*, No. 87-5036, slip op. at 28-31 (D.C. Cir. March 15, 1988). First, for a decision to be suitable for nonretroactive enforcement it must "establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . ." *Id.* at 106. That was clearly the case with the decision in *Washington Home Ownership Council*, which has significantly altered the use of emergency acts by the District. Second, the court making the determination " 'must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' " *Id.* at 106-07 (*quoting Linkletter v. Walker*, 381 U.S. 618, 629 (1965)". We are unable to discern how this factor will be affected by either decision in the instant case. The decision of the court in *Washington Home Ownership Council* is now the law and has been for over seven years; by denying retroactive application in this case we do not weaken the rule in any respect or retard its operation. Finally, the *Chevron* Court stated that courts should "weigh[] the inequity imposed by retroactive application . . ." *Id.* at 107. Applying the decision of *Washington Home Ownership Council* retroactively would open the District up to liability for a large number of actions taken pursuant to up to 84 separate statutes. *See Washington Home Ownership Council*, slip op. at 14 (stating that "[p]resumably, if full retroactive effect were accorded this Court's prior order, all 84 groups of emergency legislation were illegally enacted, and now subject to challenge."). Retro-

active application would work a substantial inequity against the District by opening it up to potentially enormous liability and severely upsetting its settled fiscal expectations. Against that potential liability we must balance the harm done to appellants by the District's failure for a limited period of time to enact certain legislation through the proper procedural methods. We find, when we "weigh the inequity imposed by retroactive application," that it supports the district court's decision to apply *Washington Home Ownership Council* prospectively. We therefore join both the district court and the D.C. Court of Appeals in finding that the emergency acts regulating conversion in the District were fully binding through August 28, 1980.

E. *The Unlawful Delegation Claim*

Appellants' final claim in this suit is that the District's entire tenant-consent conversion procedure violated their due process rights because it impermissibly delegated governmental authority to private citizens. The provision that the appellants challenge is the tenant-election section of the Rental Housing Conversion and Sale Act of 1980, D.C. Law 3-86, *codified in* D.C. Code §§ 45-1601 et seq. That provision permits condominium or cooperative conversion provided over 50 percent of eligible tenants vote for conversion in a tenant election. *Id.* § 45-1612(i). We are aware that the District of Columbia Court of Appeals has recently held that the tenant consent provisions of the Rental Housing Conversion and Sale Act of 1980 are unconstiutional delegations of legislative authority. *See Hornstein v. Barry*, No. 83-242 (D.C. App. Sept. 11, 1987), *reh'g en banc granted*, Feb. 19, 1988. Because the case interpreted the law in light of the U.S. Constitution, we need not defer to the opinion as a conclusion of local law. While we are bound by the United States Supreme Court's interpretation of the U.S. Constitution, *see, e.g.*, *Baker v. Carr*, 369 U.S. 186, 211 (1962) (stating that

the Supreme Court is the "ultimate arbiter of the Constitution"), the absence of such authority requires us to make our own independent determination about the statute's constitutionality. In so doing, we cannot agree with either the reasoning or the conclusion of the D.C. Court of Appeals.

The Supreme Court has long held that a municipality may prohibit a disfavored use of property but permit private citizens to waive that prohibition and consent to the use. *See Thomas Cusack Co. v. Chicago*, 242 U.S. 526 (1917). Appellants would have this court adopt an unduly restrictive standard of permissible government regulation. Concededly, the Court has held that some delegations of governmental authority to private citizens go so far as to violate due process. *See, e.g., Eubank v. City of Richmond*, 226 U.S. 137 (1912); *Washington v. Roberge*, 278 U.S. 116 (1928). But in other cases the Court has upheld such delegations against due process challenges. *See, e.g., Cusack, supra; New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96 (1978). In order for a legislative delegation to private citizens to survive a due process challenge, the Court instructs that two criteria must be satisfied. First, the underlying exercise of authority must be a reasonable regulation within the power of the government. *Cusack*, 242 U.S. at 528. Second, the legislature's restriction must be in the form of a general prohibition, and the delegation must be in the form of permitting private citizens to waive the protection of that prohibition. *Id.* at 531 (upholding a regulation that "absolutely prohibits the erection of any billboards in the blocks designated, but permits this prohibition to be modified with the consent of the persons who are to be most affected by such modification."); *see also Eastlake v. Forest City Enterprises*, 426 U.S. 668, 678 n.12 (1976) (stating that "[s]ince the property owner could simply waive an otherwise applicable legislative limitation, the Court in *Cusack* deter-

mined that the provision did not delegate legislative power at all.").

Both of these conditions are met by the tenant-election law that appellants challenge. First, the statute is a valid use of the District's police power. The interest of a municipality in the conversion of its apartment stock to condominiums and cooperatives cannot be gainsaid. The state has a legitimate interest in assuring the availability of adequate housing. *Cf. Eisen v. Eastman*, 421 F.2d 560, 567 (2d Cir. 1969) (upholding against constitutional challenge "[t]he New York City Rent Control Law [which] contains an impressive recital of the conditions deemed to call for its enactment . . ."). The statutes at issue in the case at bar were enacted to prevent tenants in rental housing from being displaced due to cooperative and condominium conversions. As the tenant-election statute that appellants challenge states, it was designed "[t]o discourage the displacement of tenants through conversion or sale of rental property, and to strengthen the bargaining position of tenants toward that end without unduly interfering with the rights of property owners to the due process of law . . ." D.C. Code § 45-1602(1).

The statute meets the second prong of the *Cusack* test as well. A statute survives due process challenge on this ground if it enacts a general prohibition and then delegates to private citizens the authority to waive that prohibition. As the Supreme Court has stated, "[a]n otherwise valid regulation is not rendered invalid simply because those whom the regulation is designed to safeguard may elect to forgo its protection." *New Motor Vehicle Board*, 439 U.S. at 109. The conversion statute at issue in this case fits this model. Its tenant election provision is phrased as a blanket prohibition that can be overcome through a tenant election. *See* D.C. Code § 45-1611(a)(1) (stating that "[a]n owner shall not convert a housing accommodation into a condominium or cooperative until the Mayor certifies compliance with the

provisions of this subchapter regulating conversions . . .”). The statute challenged by appellants meets the requirements laid down by the Supreme Court in *Cusack* and therefore must withstand the due process challenge.

III. Conclusion

As the long history of appellants' conversion efforts suggests, the District of Columbia's actions in the conversion application at issue in this litigation may at times have been less than exemplary. Nevertheless, non-exemplary governmental administrative actions do not automatically rise to the level of due process violations. Whatever the confusion and delay, the District was in pursuit of a legitimate governmental interest: it sought to act with sufficient deliberation and care to protect both the right of building owners to a reasonably speedy conversion process and the right of tenants to remain in their rental homes until it had ascertained that the conditions of the conversion statutes had been met. We find that the District's actions did not deprive appellants of their constitutional rights. We also find appellants' due process and Home Rule Act challenges to the statutes at issue in this case to be without merit. The decision of the district court is

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-7037

ROBERT I. SILVERMAN, *et al.*

v.

MARION BARRY, Mayor of the District of Columbia, *et al.*

[Filed May 3, 1988]

ORDER

It is ORDERED, *sua sponte*, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. R. 15 (August 1, 1987). This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

For The Court
CONSTANCE L. DUPRE
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Issued July 15, 1988

No. 86-7037

ROBERT I. SILVERMAN, *et al.*,
Appellants

v.

MARION BARRY, Mayor of the District of Columbia, *et al.*

Appeal from the United States District Court
for the District of Columbia

Burton A. Schwalb and *Lucinda J. Bach* were on the suggestion for rehearing *en banc* for appellants.

Before: WALD, *Chief Judge;* ROBINSON, MIKVA, EDWARDS, RUTH B. GINSBURG, STARR, SILBERMAN, BUCKLEY, WILLIAMS, D. H. GINSBURG and SENTELLE, *Circuit Judges*

ORDER

Appellants' suggestion for rehearing *en banc* has been circulated to the full court. No member of the court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED by the Court *en banc* that the suggestion is denied.

Per Curiam
FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

A statement of *Circuit Judge* SILBERMAN concurring in the denial of the suggestion is attached.

SILBERMAN, *Circuit Judge, concurring in the denial of rehearing en banc*: Any time the state gives a group of persons power to prevent an action by another—if the group's majority or some other proportion wishes to do so—the state increases the bargaining power of that group vis-a-vis the proponent of action. I am inclined to agree with the D.C. Court of Appeals that the constitutionality of this kind of legislative "delegation" cannot, if one thinks hard about it, ultimately turn on whether the legislative scheme requires the group's initiative to remove a prohibition or to impose one. *Hornstein v. Barry*, 530 A.2d 1177, 1183 (D.C. App. 1987), *reh'g en banc granted*, 537 A.2d 1131 (D.C. App. 1988). I suppose in the former situation there may be a slightly greater inference that the state has—as a matter of policy—determined that the action contemplated is generally disfavored; nevertheless, for the constitutionality of a given statute to turn on whether the group has the burden of going forward to stop proposed action or can simply exercise a veto when the proponent initiates action seems quite tenuous.

Nor do I think much turns on the panel's recognition that the District has a legitimate "police power" interest in adequate rental stock. *See Silverman v. Barry*, 86-7037, slip op. at 29 (D.C. Cir. May 3, 1988). I doubt there is any subject matter that falls outside of a state's police power. *See Nebbia v. New York*, 291 U.S. 502, 523-25 (1934).[1] One could argue, moreover, that this

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[1] *See Schad v. Mt. Ephraim*, 452 U.S. 61, 68 (1981) (zoning ordinance); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1927) (same); *Silverman v. Barry*, 727 F.2d 1121, 1125-26 (D.C. Cir. 1984) ("Supreme Court has not struck down a zoning ordinance on police power grounds since 1928"); *Grendel's Den, Inc. v. Goodwin*, 662 F.2d 88, 92 (1st Cir. 1981), *rev'd on other grounds sub nom. Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (zoning ordinance); *Eisen v. Eastman*, 421 F.2d 560, 567 (2d Cir. 1969), *cert. denied*, 400 U.S. 841 (1970) (rent con-

condominium-conversion law—at least over time—will actually reduce rental apartments because it, like rent control laws, creates a powerful disincentive to the construction of new rental apartment buildings.[2]

Undeniably, however, the statute will enhance the bargaining power of existing tenants who live in affected buildings. As Judge Mikva noted, the Act was passed explicitly to affect "the bargaining position of tenants." Slip op. at 29. One way of looking at the statute—and in my view the correct way—is to recognize the legislature deliberately sought to enhance tenants' *property* rights relative to owners of apartment buildings. Landlord-tenant law traditionally is fashioned to strike what a particular government thinks is the appropriate bargaining relationship between owners and renters, just as collective bargaining law strikes an analogous balance between companies and unions. Thus, had the statute absolutely barred landlords from evicting tenants without their consent in order to convert the building, or for that matter for any other purpose so long as no unconstitutional taking was implicated (assuming, for example, fair rents were required[3]), I do not believe a serious constitutional question appears. *See Griffin Development Co. v. City of Oxnard*, 703 P.2d 339 (Cal. 1985) (upholding regulations that effectively prohibited condominium conversion against a Fifth Amendment takings challenge); *Troy Ltd. v. Renna*, 727 F.2d 287 (3d Cir. 1984)

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trol); *see also* U.S. CONST. amend. X. *See generally* Note, *The Validity of Ordinances Limiting Condominium Conversion*, 78 MICH. L. REV. 124, 128-32 (1979).

[2] Of course, that is not to suggest that even if increasing rental stock were the District's sole objective the legislation would not pass the due process rational basis test, which limits the state's exercise of police power. *See Schad*, 452 U.S. at 68.

[3] *See Penn Central Transp. v. City of New York*, 438 U.S. 104, 136 (1978) (no Fifth Amendment takings where reasonable return upon the land allowed).

(upholding a statutory tenancy of forty years duration for senior citizens following a condominium conversion against a Fifth Amendment takings challenge).

The unconstitutional delegation issue arises apparently then only because *every* tenant is not granted a veto over a conversion plan that would lead to his or her eviction; instead a majority vote governs. Since these cases are thought to involve a deprivation of the rights of the property owner, it seems passing strange that the constitutional question arises because less power rather than greater is delegated to the tenants as a whole. I think it must follow that if every tenant could constitutionally be empowered to withhold consent to an owner's condominium conversion that would result in the tenant's eviction, then surely a majority can.

The three Supreme Court cases which seem so difficult to reconcile—and which troubled both the panel of this court and our colleagues across the street—are explainable in my view only if one focuses on the property interests which the ordinances furthered rather than the consent procedure employed.

In *Eubank v. City of Richmond*, 226 U.S. 137 (1912), the Supreme Court held unconstitutional a municipal ordinance that permitted two-thirds of the property owners on any block to establish a building line (between five and thirty feet) that would limit new construction between the line and the street because it was an excessive legislative delegation to those property owners. The Court thought that those property owners were thereby authorized to indulge only their "caprice" or "taste." *Id.* at 144. According to the Court, no public policy interest was involved and implicitly, at least, the Court perceived no legitimate property interest protected or enhanced by the offending statute.

The Court zigged, however, when faced five years later with a Chicago ordinance that precluded construction of

billboards on a residential block without consent of a majority of owners on the block. *Cusack Co. v. City of Chicago*, 242 U.S. 526 (1917). Although the Court relied on the distinction between initiation and veto to distinguish *Eubank*, *id.* at 531, I think the unarticulated but key consideration that drove the Court's opinion is that a commercial billboard in a residential neighborhood would manifestly impair a homeowner's property value. The Supreme Court of Illinois, from which the appeal came, had relied, to sustain the ordinance (and presumably to avoid the impact of *Eubank*), on evidence that billboards induced an incredible array of immoral and unsanitary practices. The United States Supreme Court did note that a prohibition against the erection of billboards served the city's interest in "safety, morality, health and decency." But that ground to distinguish *Eubank* also seems quite unsatisfactory since, if billboards led to a breakdown in public morality, why would a majority of property owners be allowed to permit them on their block? I think one important difference between *Cusack* and *Eubank* is that in the earlier case the Court did not perceive any legitimate property interest in those who wished the setback. In other words, the Court was unwilling to equate "taste" with dollars and cents. Erection of billboards in a residential block, on the other hand, would result in a rather obvious diminution in the value of a homeowner's property.

In the third case in the trilogy, *Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928), the Court struck down a zoning ordinance that permitted philanthropic homes for children or old people in one of the six zoning districts of Seattle (the First Residence District—which appears in the opinion to have been an affluent area) only with a majority of the residence owners' consent. The ordinance, passed in 1925, was apparently designed to prevent the trustee from replacing an old building housing fourteen "aged poor" with a new one that could

accommodate thirty. The Court relied on *Eubank*, distinguishing *Cusack* as not applicable because billboards were a "nuisance." *Id.* at 122. By contrast, the Court saw nothing in the record in *Roberge* to show "any injury, inconvenience or annoyance to the . . . district, or *any person.*" *Id.* (emphasis added). I think the case stands for the limited proposition that a city cannot exclude "widows and orphans" from the high rent district totally without explanation and therefore has little to do —in reality—with the means used. It is really a forerunner of later equal protection cases, and under modern jurisprudence the statute would probably not pass the rational basis test. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448-50 (1985).[4]

Because these cases all involve a procedure whereby a selected group casts a vote, either positively or negatively, I think the Court misleadingly treated them as if the voting process was constitutionally significant. Permitting a group of homeowners to vote on whether to allow new construction in their neighborhood suggests superficially a delegation to a sub-legislature. *See Eastlake v. Forest City Enterprises*, 426 U.S. 668, 673-78 (1976).[5] But, *Cusack* and *Roberge* I believe would have been decided the same way if any one of the homeowners had been given the power to stop the proposed action. Those cases really turn on whether the Supreme Court saw the local government recognizing and protecting what the Court thought a legitimate property interest. *Eubank*, on the other hand, is a true unconstitutional delegation case not because of the majority consent procedure but

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[4] *See supra* note 2.

[5] It is true that in *Eastlake* the Supreme Court distinguished a referendum from a vote by a "narrow segment," 426 U.S. at 677, thus implying a continuing vitality to the *Eubank* rationale, but I think that was only because it was the most obvious ground to avoid *Eubank*.

rather because until the majority of owners on the block fixed the property line there was no normative standard against which to judge the legality of proposed construction. *See also Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936). If a city council were to instead, today—in an era when "taste" is at the core of much environmental legislation—bar new construction in a block closer than, say, twenty feet from the street, if a majority or any homeowners objected, I think such an ordinance would pass constitutional muster.

In sum, since the District's interest in enhancing the property rights of tenants cannot be said to be beyond its police power—in the way the mere "taste" of homeowners appeared in 1907—and since we are not faced with a failure of the District's Council to elaborate a legal norm, the tenant election section of D.C.'s Rental Housing Conversion and Sale Act of 1980, D.C. Code § 45-1612(i), in my view, is not an impermissible delegation of legislative power. The majority of tenants' approval procedure is not, in my view, of independent constitutional significance.

APPENDIX C

[UNPUBLISHED]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-0394

ROBERT I. SILVERMAN, *et al.*,
Plaintiffs,

v.

MARION BARRY, Mayor of the District of Columbia, *et al.*,
Defendants.

[Filed Aug. 22, 1986]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs are apartment building owners who have brought a constitutional claim against officers of the District of Columbia. Plaintiffs contend that under the D.C. statutory scheme governing conversion of rental buildings to condominium or cooperative buildings, they were entitled to convert their property ("Van Ness South") after completing certain regulatory steps. When they were not allowed to do so, plaintiffs contend that they were stripped of an important property interest without due process of law, without equal protection of the law, and in violation of the D.C. Home Rule Act. Plaintiffs seek damages in an amount equal to the difference in what they could have sold their property for as a condominium/cooperative building and what they actually sold it for as a rental building.

Defendants contend that the denial of permission to convert was not a violation of of [sic] plaintiffs' property rights because it was done pursuant to constitutionally sound statutes, regulations, and policies. Defendant-Intervenor, an incorporated group of tenants in the building, concurs with defendants.

This case is on remand from the court of appeals. Previously this court (Hart J.) dismissed plaintiffs' complaint for want of jurisdiction—the failure to present a substantial constitutional question—under 28 U.S.C. §§ 1331 and 1343, and on grounds of comity and abstention. That decision was reversed. *Silverman v. Barry*, 727 F.2d 1121 (D.C. Cir. 1984).

After completion of discovery, defendants moved to dismiss the complaint and to dismiss Defendant-Intervenor. This court denied both motions, finding that plaintiffs' claims were not barred by the doctrines of res judicata or collateral estoppel. *Silverman v. Barry*, No. 81-394 Mem. & Order (D.D.C. Feb. 14, 1985) (Flannery, J.). Subsequently, plaintiffs and defendants stipulated and agreed to various facts. (Plaintiffs' Exhibit 59) (hereinafter referred to as "Stipulation"). It should be noted that since the time of the court of appeal's decision, the posture of the parties has changed somewhat. Since plaintiffs sold Van Ness South in 1984 as a rental building, they no longer seek injunctive or declaratory relief, but rather seek damages only.

This matter came before the court for a non-jury trial on April 7, 1986. Upon hearing the opening arguments of counsel and receiving into evidence certain exhibits, the court agreed with the parties that this matter could proceed without oral testimony. Therefore, the parties agreed to submit their contentions in writing in the form of proposed findings of fact and conclusions of law. Further, the parties agreed to submit in writing any objections to the introduction of any further exhibits. Finally, the parties agreed to bifurcate this matter so that

only the issue of liability is dealt with at this stage. *See* Transcript of Trial, filed April 22, 1986 (hereinafter referred to as "Transcript").

Plaintiffs' proposed findings and a revised exhibit list were filed April 26, 1986. Defendant's and Defendant-Intervenor's proposed findings were filed May 1, 1986. Plaintiffs filed objections to Defendant's and Defendant-Intervenor's findings on May 8, 1986. Closing argument was heard on May 15, 1986.

This court has considered the objections raised by the parties and now rules on the admissibility of further exhibits. Also, pursuant to Federal Rules of Civil Procedure Rule 52(a), the court now makes findings of fact and conclusions of law on the issue of defendants' liability.

I. *Admissibility of Evidence*

On April 7, 1986, and in the presence of all parties, the court admitted into evidence the following Plaintiffs' Exhibits: 1, 2, 4, 9-14, 14a, 15, 15a, 15b, 17-23, 25, 26, 28-33, 35, 39-47, 51, 54, 59, 60, 61, 61a, 62, 63, 63a, 64, 64a, 64b, 64c, 67, 67a, 67b, 68, 68a, 69, 70, 70a, and 71.

Plaintiffs also now offer Plaintiffs' Exhibits 5-8, 34, and 74-76. Plaintiff incorrectly has assumed that Plaintiffs' Exhibits 57-58 and 72-73 were already received into evidence; they will be considered now. Defendants, by use in their proposed findings of fact, appear to offer Defendants' Exhibits 1, 11, and 12. Defendant-Intervenor offers Defendant-Intervenor's Exhibits 1-7.

Plaintiffs' Exhibit 57 is a November 19, 1979 memorandum from Robert Moore, Director of the District's Department of Housing and Community Development, to Mayor Marion Barry discussing the final draft of the District's housing policy. Plaintiffs' Exhibit 58 is the Agreement for Sale and Purchase of Land between plain-

tiffs and the Chevy Chase land company for the Van Ness South property, dated September 8, 1982. Plaintiffs' Exhibit 75 is a letter from Lawrence Miller to Miriam Jones, of the District's Department of Housing and Community Development, dated November 16, 1982. Plaintiffs' Exhibit 76 is another letter from Miller to Jones on the same date. All these exhibits appear probative of the issues in this case. Inasmuch as no objections have been raised regarding their introduction, they are admitted into evidence.

Defendant-Intervenor objects to the introduction of Plaintiffs' Exhibits 5-8 as irrelevant. These exhibits are documents concerning the application of Van Ness *North* for permission to convert to condominium or cooperative. Defendant-Intervenor contends that while this building is next to the building in question in this suit, its ability to convert is irrelevant because it is a smaller building (Van Ness North is 433 units while Van Ness South is 625 units) and the application was filed four and one-half months before the Van Ness South application was filed. The court finds that the speed of converting Van Ness North is probative of the manner in which buildings of this kind, in this area, and during this general time period could be handled by the District of Columbia. Objection overruled.

Defendant-Intervenor also objects to the introduction of Plaintiffs' Exhibit 34 as hearsay and irrelevant. This exhibit is a letter from Lenore M. Reece to Miriam Jones dated July 7, 1980. Attached is a letter from Reece to some other tenants apparently disagreeing with their efforts to represent the tenants. The court agrees that this is hearsay and is not probative of the issues in this suit. Objection sustained.

Finally, Defendant-Intervenor objects to the introduction into evidence of Plaintiffs' Exhibits 72, 73, and 74, which are affidavits of Robert Silverman, Abraham

Greenstein, and Marguerite Owen. Defendant-Intervenor contends that they are hearsay and that it has had no opportunity to cross-examine the witnesses. Defendant-Intervenor also believes they are irrelevant. This court finds that while the affidavits have not been subject to cross-examination, when defendant suggested proceeding as a stipulated trial, plaintiff concurred with the understanding that affidavit evidence could be submitted from the three witnesses he intended to call to the stand. (Transcript at 69-70). It is only fair that these affidavits be entered into evidence. Objection overruled.

Defendants' Exhibit 1 is simply selected pages of the D.C. Condominium Office Log, which is already in evidence as Plaintiffs' Exhibit 46. This exhibit is accepted into evidence as well.

Plaintiffs object to the introduction of Defendants' Exhibit 11, which is a D.C. government brochure entitled "Housing Policy for the District of Columbia." Plaintiffs contend that there is no indication of what time period the brochure covers; a reference within it suggests that is was issued after June and July of 1980, the period when Van Ness South attempted to convert. This court agrees that absent a showing of when this "policy" was in place, the document cannot be considered probative of the District's policy at the time relevant in this case. Objection sustained.

Plaintiffs object to the introduction of Defendants' Exhibit 12, a brochure entitled "Housing Problems, Conditions, and Trends in the District of Columbia." Plaintiffs contend that it is not a deposition exhibit on which plaintiffs could cross-examine. Further, neither the document nor the figures contained therein have been authenticated. This court finds that the brochure is a public document which is useful and trustworthy in analyzing housing trends in the District. As an official publication issued by the District of Columbia, the brochure is self-

authenticating. Federal Rules of Evidence Rule 902(5). Objection overruled.

Defendant-Intervenor's Exhibit 2 is a letter dated June 28, 1980, from Defendant-Intervenor to Miriam Jones requesting a hearing on the VNSTA application for Certificates of Exemption and Eligibility. Defendant-Intervenor's Exhibit 3 is a letter dated July 21, 1980 from Defendant-Intervenor to Jones, enclosing 33 recisions of consents to convert and 16 declarations of reasons for revocation. Defendant-Intervenor's Exhibit 5 is a memorandum dated August 11, 1980 by Michael Nussbaum regarding a conversation with Henry Brylawski. Defendant-Intervenor's Exhibit 6 is a letter dated November 24, 1982 from the American Arbitration Association to Jones. Defendant-Intervenor's Exhibit 7 is a letter dated January 5, 1983 from Jones to Lawrence Miller. All these exhibits appear probative of the issues in this case. Inasmuch as no objections have been raised regarding their introduction, they are admitted into evidence.

Plaintiffs object to the introduction of Defendent-Intervenor's [sic] Exhibit 1 on the grounds that it has not been properly authenticated. The exhibit is an unsigned, undated and photocopied seven-page document titled "1979 Condominium/Cooperative Office Annual Report." The court agrees that the trustworthiness of this document is not apparent and that absent at least authentication, it cannot be accepted into evidence. Objection sustained.

Plaintiffs object to the introduction of Defendant-Intervenor's Exhibit 4 as unauthenticated hearsay which has no meaning. The exhibit is a July 10, 1980 telephone message from Miriam Jones to Michael Nussbaum's office. The message indicates that whereas Jones would proceed with the calling of tenants of Van Ness East, "Ms. Jones will hold off on per your conversation" with regard to Van Ness South. This message is unauthenti-

cated and ambiguous hearsay which cannot be accepted into evidence. Objection sustained.

II. *Findings of Fact*

General Findings

1. Plaintiffs are the sole general partners of a District of Columbia Limited partnership known as Van Ness Properties III, which built and owned a 625 unit multi-family residential building known as Van Ness South at 3003 Van Ness Street, N.W., Washington, D.C. (Stipulation, ¶¶ 1, 3).

2. Defendants are the District of Columbia and officers of the District of Columbia government. Defendant-Intervenor is the "Group to Save Van Ness South for Everybody, Inc.," a group of tenants at Van Ness South, who incorporated in 1981 for the purpose of maintaining Van Ness South as a rental accommodation. (Stipulation, ¶ 43).

3. The District's Department of Housing and Community Development ("DHCD") was, prior to March of 1983, the executive agency to which the Mayor delegated authority to administer the laws and regulations concerning conversion of housing from rental properties to condominiums or cooperatives. In March of 1983, that authority was transferred to the newly-created Department of Consumer and Regulatory Affairs. (Stipulation, ¶ 4).

Method of Converting to Condominium

4. Until May 29, 1979, conversion from rental to condominium was governed by the Condominium Act of 1976. D.C. Law 1-89, *codified in*, D.C. Code 5-1201 et seq. (Supp. V, 1978 ed.) and thereafter in, in part, D.C. Code § 45-1801 et seq. (1981 ed.) (this law as it existed during the relevant time period is Plaintiffs' Exhibit 60). The Condominium Act permitted the conversion of a ren-

tal apartment building to a condominium building if: (1) a majority of tenants approved; or (2) it was a "high rent" accommodation, defined as one having a rent roll in excess of a statutory formula based on the type of unit. (Plaintiffs' Exhibit 60, § 501).

5. As of April 1979, a condominium building was initially created by filing condominium instruments with the Recorder of Deeds. (Plaintiffs' Exhibit 60, § 201). The District of Columbia, by rule and practice, then required a converter to apply for and receive a certificate of eligibility ("C/E"). (Plaintiffs' Exhibit 59). If the District required more information to act on the application, the District had to make a written request to the applicant for such data. (Plaintiffs' Exhibit 61). The applicant could only sell interests in condominium units after fulfilling certain statutory requirements. First, an application for registration had to be filed. Once done, the District, within five days, would issue a notice of filing of the application. (Stipulation, ¶ 11). If 60 days elapsed without the District denying the registration, then it was deemed accepted and the condominium units could be sold. (Plaintiffs' Exhibit 60, §§ 402(a), 405, & 406(a)).

Method of Conversion to Cooperative

6. Since 1940, conversion from rental to cooperative has been provided for in D.C. Code 29-801 et seq. (1973). A corporation created to hold cooperative property is created by filing articles of incorporation with the Recorder of Deeds. (D.C. Code §§ 29-1105, 1106.)

7. From 1975 until April of 1979, the District enacted a series of consecutive emergency and non-emergency acts prohibiting conversion to cooperative. As of 1977, however, these acts permitted the conversion of a rental apartment building to a cooperative building if: (1) it was a "high-rent" building; or (2) a majority of tenants approved. (Stipulation, ¶ 6; D.C. Law 1-71, D.C.

Law 1-189, D.C. Act 2-13, D.C. Act 3-2; Plaintiffs' Exhibits 59, 12, & 13).

8. From April 25, 1979 to May 4, 1979 there was a legislative gap when there was no statutory prohibition against cooperative conversions. On May 4, 1979, another emergency act was enacted reinstating the moratorium on conversions. (Plaintiffs' Exhibits 59, 14).

9. To convert as a "high rent" building, the District of Columbia, by rule and practice, required a converter to apply for a certificate of exemption ("C/Ex") from the moratorium. (Plaintiffs' Exhibit 59). If the District wanted additional information before processing the application, it had to give written notice to the applicant. (Plaintiffs' Exhibit 62, §§ 2.2 & 2.3). The District required the filing and granting of an application for a C/Ex even during the nine-day period when there was no emergency prohibition against conversions to cooperatives. (Plaintiffs' Exhibit 59).

"High Rent" Conversion

10. A "high rent" application for either condominium or cooperative conversion had to be submitted under oath and had to be accompanied by a sworn document filed by the landlord with the District's Rental Accommodation Office ("RAO"), which is charged with enforcing the District's rent control laws. (Plaintiffs' Exhibits 61 & 62). The DHCD took the position in 1979 and 1980 that as the first step toward conversion, a C/E or C/Ex had to be obtained. Absent a C/E or C/Ex having first been issued, a residential building: (1) could not be converted to nor constituted as a condominium or a cooperative and (2) could not file an application for registration for sale of interests in the condominium or cooperative building. (Stipulation, ¶ 13).

11. In processing an application for a "high rent" C/E or C/Ex, the DHCD is supposed to act chronologi-

cally. (Jones Deposition at 77-78). DHCD would compare the rents shown on the sworn application and the rents shown on the RAO form. If they matched, the District would compute the rent roll arithmetically to determine if the actual rents exceeded the then-statutory minimum necessary to qualify for "high rent" status. Plaintiffs' Exhibits 61, 62, 73, 63a, 70).

12. The "high rent" application for Van Ness North was granted 16 days after it was filed in December of 1978. On April 26, 1979, plaintiffs filed "high rent" applications for a C/E or C/Ex to convert Van Ness South. (Stipulation, ¶ 12).

13. The growth of conversions during this period was dramatic. Condominium registrations rose from 468 units in 1976 to 2,642 units in 1978 to 1,356 units in just the first quarter of 1979. Issuance of C/Es rose from 485 units in 1976 to 10,481 units in 1978 to 1,299 units in the first quarter of 1979. (Defendants' Exhibit 12).

Change of Administration

14. On January 1, 1979, Marion Barry took office as Mayor of the District of Columbia. The offices and personnel involved in the condominium and conversion functions changed. (Plaintiffs' Exhibits 68, 59, 17, 18, & 70). Robert L. Moore became the Director of the DHCD; he may have believed conversions were occurring too rapidly. (Plaintiffs' Exhibits 68 & 70, Thompson Dep. 41, 4; Jones Dep. 89, 110). A DHCD staff person, Maria Johnson, wrote a memorandum to Moore recommending ways to restrict conversions administratively, including suggestions that would substantially reduce conversions of properties eligible to convert but which did not yet have a C/E. (Plaintiffs' Exhibit 19, ¶¶ 1, 2). On April 24, 1979, Miriam Jones, a DHCD housing relations assistant, wrote a memorandum adopting Ms. Johnson's recommendations and suggesting additional restrictions. (Plaintiffs' Exhibit 20).

15. Between March 12, 1979 and May 29, 1979, no new high rent or tenant consent application for a C/E or C/Ex filed after March 12, 1979 was granted or denied. (Plaintiffs' Exhibit 23). This included the "high rent" applications filed by Van Ness South for a C/E and a C/Ex on April 26, 1979 (Stipulation, ¶ 10; Plaintiffs' Exhibits 1, 2) despite the fact that the rents then in effect at Van Ness South exceeded the then-statutory minimums required for "high rent" status. (Plaintiffs' Exhibit 59). Yet it appears that a C/E was not granted Van Ness South at this time because of the volume of pending applications before DHCD. (Jones Deposition, at 173). DHCD records show that there were more than 60 applications for conversion to condominium status on file at this time. (Plaintiffs' Exhibit 46). For the first five months of 1979, applications for C/E's were approximately as follows:

Month	Number of applications	Number of units
January	14	669
February	11	649
March	35	2,521
April	35	3,642
May	19	1,106

(Plaintiffs' Exhibit 46). While no new high rent or tenant consent applications were decided from mid-March through May of 1979, the DHCD did continue to grant C/E's and C/Ex's. From the District's logs it appears that CO021, CO041, CO043, and CO050 were approved for cooperative conversion (Plaintiffs' Exhibit 47) and CO262, CO277-279, CO282, CO285-288, CO291-298, CO300-301, CO310, CO312-313, CO315, and CO323 were approved for condominium conversion. (Plaintiffs' Exhibit 46). These were not all small buildings; for example, CO050 was a 290-unit conversion to cooperative on April 11, 1979 and CO312 was a 315-unit conversion to condominium on May 15, 1979. Review of these logs shows that the applications were handled roughly in chronological order, albeit not exactly.

Emergency Legislation

16. On May 29, 1979, the District enacted the Emergency Condominium and Cooperative Stabilization Act of 1979, a 90-day act prohibiting the District from issuing any high rent C/E or C/Ex. (Plaintiffs' Exhibit 15, ¶¶ 2(a), 3(a)). In its resolution explaining the need for the moratorium, the Council of the District of Columbia stated that "high rent" conversions were "threatening to squeeze out of the city low and middle-income people who cannot afford to buy apartments they now rent," and were "seriously depleting the rental housing supply in the District of Columbia." The Council also found that "high rent" certificates were being held for speculative reasons. Emergency Condominium and Control Resolution of 1979, 25 D.C.R. 10370 (June 1, 1979). Had Van Ness South been granted its C/Ex prior to creation of this new legislation, it could have immediately incorporated and been unaffected by the high rent moratorium. Had it received its C/E, it could have filed its condominium instruments and served its notice of intent to convert (Plaintiffs' Exhibit 60, ¶ 408(b)(1)) or could have filed an application for registration and gotten its five-day notice. Instead, Van Ness South could do nothing.

17. At the end of this 90-day moratorium, on August 27, 1979, the District enacted a second, identical moratorium. (D.C. Act 3-95). A lawsuit was brought and on October 19, 1979 the D.C. Superior Court declared the second act unlawful and enjoined its enforcement. *Washington Home Ownership Council, Inc. v. District of Columbia*, No. 10624-79 (D.C. Sup. Ct. Oct. 19, 1979). The court found that the District had acted unlawfully by misusing the emergency powers granted to it under § 412(a) of the D.C. Self-Government and Government Reorganization Act since emergency legislation could not be used as a shortcut for enacting routine or temporary measures. (Plaintiffs' Exhibit 67). That decision was stayed pending its appeal. (Plaintiffs' Exhibit 67(a)).

The District passed another identical emergency act on November 23, 1979. (Stipulation, ¶ 15; D.C. Act 3-132).

The Conversion Efforts for Van Ness South

18. On January 28, 1980, plaintiffs contracted to sell the Van Ness South building and land to the Investment Group Development Corporation ("IGDC") for $40,130,000 in cash. (Plaintiffs' Exhibit 59). That agreement was terminable if a C/E or C/Ex were not granted for the building within a certain period of time. (Plaintiffs' Exhibit 25, § V(b)), or if the Superior Court decision was reversed. (Plaintiffs' Exhibit 25). IGDC then established a corporation for the conversion of Van Ness South to a cooperative. (Stipulation, ¶ 2).

19. On February 20, 1980, plaintiffs gave the Van Ness South tenants a notice of intent to sell, a notice of intent to convert, and an offer to sell the property to a corporation set up by the tenants to buy the property. (Plaintiffs' Exhibits 51, 26). This was done in accordance with D.C. Code § 45-1681 et seq. The District treated the notice of intent to convert as a notice to vacate, apparently fearing the notices might be used as bases for eviction. For this reason, the District issued a Provisional Restraining Order against plaintiffs' notice of intent to convert, thereby voiding it. (Plaintiffs' Exhibit 51).

20. In February of 1980, the District enacted additional emergency acts identical to the prior ones lasting 180 days. (Stipulation, ¶ 19; D.C. Law 3-53; D.C. Act 3-151).

21. On May 20, 1980, the Van Ness South Tenants Association ("VNSTA") approved by majority vote the purchase of the Van Ness South property on the terms of the January 28, 1980 contract but for use as a condominium building. (Plaintiffs' Exhibit 31). This was done in accordance with § 602(b). On May 22, 1980,

the VNSTA executed a purchase contract. On May 27, 1980, the VNSTA obtained the approval of the land owner for the tenants to buy the land. (Plaintiffs' Exhibit 30).

22. On May 28, 1980, the D.C. Court of Appeals affirmed the Superior Court's ruling regarding the emergency legislation and invalidated the successive acts. *District of Columbia v. Washington Home Ownership Council, Inc.*, No. 79-1053 (D.C. May 28, 1980 (en banc). The court stayed its mandate for 90 days to give the District "an appropriate interval in which to deal with its emergency legislation." (Plaintiffs' Exhibit 67(a), at 1360). That mandate expired on August 28, 1980. The court remanded the decision for the parties and lower court to evaluate its effect. The Superior Court issued an order making its decision prospective only. *Washington Home Ownership Council, Inc. v. District of Columbia*, No. 10624-79 (D.C. Sup. Ct. Dec. 3, 1980) (Plaintiffs' Exhibit 67(b)) Judge Revercomb held that all the emergency acts and the acts substantially similar to the emergency acts passed prior to August 28, 1980 were of full force and effect. This decision was not appealed.

23. At this time, there were two sets of rules relating to conversion by a § 602(b) tenant association. Had a C/E or C/Ex been issued before May 29, 1979, Van Ness South could have obtained an exemption from that moratorium under Section 4(a)(3) if the tenant association approved conversion by a majority vote. Under the regulations regarding exemptions from the moratorium, upon filing of a tenant association officer's affidavit evidencing such approval, the approval would not have been questioned and the exemption would have been granted in 10 days. (Plaintiffs' Exhibit 15(a), 64(c), § 1.2(c)(6); § 3.1. Since plaintiffs did not have a C/E or C/Ex, this could not be done.

24. For buildings which had received no C/E or C/Ex before the May 29, 1979 "high rent" moratorium, con-

version with majority tenant consent was still available under § 501(b)(2) of D.C. Law 1-89 (Plaintiffs' Exhibit 60). To do that it was necessary under the District's Rules to obtain an individually signed consent from the head of each household residing as a tenant in the building. (Plaintiffs' Exhibit 61, § 1.5(c)).

25. The VNSTA sought and obtained on May 23, 1979 the District's advance approval of the consent form they intended to use. (Plaintiffs' Exhibits 29, 74). By June 17, 1980, the VNSTA had received signed consents from a majority (319 out of 603 eligible units) and therefore the VNSTA filed an application for a C/E based on tenant consent under § 501(b)(2) of D.C. Law 1-89. (Plaintiffs' Exhibit 32, Application Item 4, at 2; Plaintiffs' Exhibit 59).

26. On June 23, 1980, the VNSTA amended the application to ask also for a C/Ex for conversion to cooperative, and submitted 10 additional consents. (Stipulation, ¶ 26; Plaintiffs' Exhibits 33; 59, ¶ 26, at 11). On July 28, 1980, the tenants submitted their application for registration of Van Ness South as a condominium with a $23,125 fee. (Plaintiffs' Exhibits 35, 36, 59). Additional consents and some recisions were filed June through August. (Stipulation, ¶¶ 27-33).

27. The District did not process the VNSTA's application for a C/E or for a C/Ex, nor did it process the VNSTA's registration application. (Plaintiffs' Exhibit 63, 63(a)).

28. The District did not issue the C/E or C/Ex because it was telephoning every tenant during business hours to confirm the consents. If a tenant could not be reached by telephone after three calls, DHCD would attempt to reach the tenant by other means, which included leaving messages at the front desk or contacting the tenant association to advise the tenant. (Deposition of Miriam Jones, at 236-37; Deposition of Pamela Payne,

at 24-25, 28, & 37-39). If the tenant still could not be reached, the tenant's consent was not considered valid and was not counted in determining whether a majority of tenants consented to conversion. (Stipulation, ¶ 34).

29. Checking consents with tenants had been done customarily in the past, (Deposition of Miriam Jones, at 18, 19, & 88), but it had never been the policy, at least before March 1979, to reject an unnotarized consent because the tenant could not be reached by phone. (Plaintiffs' Exhibit 73). The District's rules made no explicit reference to the need for a confirmation of a consent for it to be deemed valid, nor did the District provide written notice of any need for verification. (Stipulation, ¶ 35; Plaintiffs' Exhibit 59). At the same time, there is no evidence that plaintiffs did not have actual notice of this policy of verifying tenant consents by phone. Only notarized consents were by themselves deemed valid, though no such provision for notarization was suggested by the District when it approved the consent forms.

30. On August 7, 1980, the District advised the VNSTA that while the VNSTA had produced 344 unrescinded consents and hence a majority, only 274 had been confirmed by telephone and, as a result, the District would not deem there to be a majority of 302. (Plaintiffs' Exhibits 59, 40, 74). When the VNSTA was advised that the District would accept as valid notarized consents, the VNSTA sought to contact and obtain such consents by Friday August 8, 1980. By Saturday, August 9, 1980, 32 additional verifications were submitted to the District. (Plaintiffs' Exhibits 59, 40). The District's position, however, is that the DHCD was not required to work beyond normal working hours to process the VNSTA applications.

Permanent Legislation

31. On Saturday, August 10, 1980, Mayor Barry signed into law the Rental Housing Conversion and Sale Emergency Act of 1980, D.C. Act 3-248 (Plaintiffs' Exhibit 15(b), § 509, at 42). The Act eliminated "tenant consent" conversions. Various restrictions were imposed by the act making conversion expensive and difficult. The act required the owners of any housing accommodation seeeking to convert to condominium status to obtain approval in an election of at least a majority of tenants therein. The act was made permanent by D.C. Law 3-86 and 5-61, D.C. Code § 45-1601 et seq. (Plaintiffs' Exhibit 59).

32. On October 9, 1980, the VNSTA was told that its pending applications could not be further processed because of the new legislation. (Plaintiffs' Exhibits 41, 59).

33. The VNSTA terminated its contract with plaintiffs on November 7, 1980 and IGDC terminated its contract with plaintiffs on July 31, 1981. (Plaintiffs' Exhibits 43, 45). Both terminations were the result of the failure to obtain either a C/E or a C/Ex. (Plaintiffs' Exhibits 72, 74).

34. In 1982, the general partners of Van Ness South sought to convert Van Ness South pursuant to the Rental Housing Conversion and Sale Act of 1980. On November 10, 1982, an election was held to determine whether a majority of those tenants eligible to vote in the election approved conversion. The election results certified by the District reflected a close majority opposed to conversion.

35. In 1984, plaintiffs sold Van Ness South as a rental building for $27 million, an amount less than the contract price under the 1980 contracts with IGDC and the VNSTA.

III. *Conclusions of Law*

1. This court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1332, D.C. Code § 45-1653 and the principles if pendent jurisdiction.

2. The Fifth Amendment prohibits the taking of private property for a public purpose absent just compensation. There is no set formula for determining when governmental action results in a taking; rather, the particular circumstances in each case must be examined. *Kaiser Aetna v. United States*, 444 U.S. 164, 175, 100 S. Ct. 383, 390 (1979). Generally, a "taking" analysis requires the weighing of private and public interests, since all governmental regulation by definition involves some curtailment of private rights to promote a public purpose. *Agins v. City of Tiburon*, 447 U.S. 255, 260-61, 100 S. Ct. 2138, 2141 (1980).

3. The Fifth Amendment also prohibits a regulatory scheme that has no rational basis. The right of equal protection under the law protects individuals from laws which are not substantially related to important and legitimate objectives of commercial regulation. *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249 (1985).

4. With regard to plaintiffs' due process challenge and equal protection challenge, the private interest asserted is the right to convert Van Ness South from a rental building into a condominium or cooperative property. This court finds that neither through specific instances of conduct nor through the totality of the events has the District used administrative delay of plaintiffs' applications, used successive and illegal emergency measures which prohibited conversion, or used an impermissible delegation of power to the tenants of Van Ness South to take plaintiffs' property without due process of law or without equal protection of the law.

5. The court of appeals noted that the due process analysis requires essentially an ad hoc, factual inquiry.

Silverman v. Barry, 727 F.2d at 1126. As discussed *infra*, this court has considered several factors including the economic impact of the District's regulations, the administration of these regulations, the consequent interference with reasonable investment backed expectations, and the character of the governmental action. *Kaiser Aetna*, 444 U.S. at 175, 100 S. Ct. at 390 (1979). The inquiry has been conducted with respect to Van Ness South and the particular estimates of economic impact and ultimate valuation relevant to its unique circumstances. *Virginia Surface Mining & Reclamation Ass'n v. Hodel*, 452 U.S. 294, 295, 101 S. Ct. 2352, 2370 (1981).

6. As a general matter, it is noted that these kinds of laws and regulations have been in existence for years. (Findings of Fact, ¶¶ 6, 7). They exist to provide for an orderly procesing of conversion from rental property to unit-ownership property. The laws, and the regulations and policies which implement them, automatically diminish the economic value of property such as Van Ness South by requiring that certain procedures be followed before its owners can break up Van Ness South into units for sale. Yet the laws do not strip the owner of all value in the property or even of most of its value; rents continue to be collected during the processing period and if conversion is denied the property can be sold as a rental property. Builders and owners of large apartment buildings, such as plaintiffs, have been aware since the 1940's that laws may prevent them from exercising total control over their property. Investing in a large apartment building therefore always carries a risk if the ultimate goal is to sell individual condominium or cooperative units. In this case, Van Ness South had been operating for a number of years as a rental building; the government did not step in and prevent plaintiffs from using Van Ness South in a way it had been used before. Rather, the owners sought to change the manner in which they used the building at a time when the Dis-

trict was undergoing a change in its conversion procedures. To determine whether plaintiffs' failure to receive permission to change deprived them of a vested property interest requires a step-by-step analysis of the actions taken by the District.

7. Up until 1979, the District had in place laws and regulations that controlled the property right of individuals to convert into condominium or cooperative properties. The regulations implementing the laws included the requirements of a C/E for conversion to condominium and a C/Ex for conversion to cooperative if the building was a high rent building. These laws and regulations by themselves did not violate plaintiffs' due process rights. Despite the Fifth Amendment, the government is free to create or to eliminate statutory entitlements *legislatively* since that legislative determination provides all the process that is due. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982). Further, these laws and regulations survive an equal protection analysis as a permissible exercise of police power inasmuch as they are properly enacted land use regulations. *See Nectow v. City of Cambridge*, 277 U.S. 183 (1928) (regarding zoning ordinances); *see also Eisen v. Eastman*, 421 F.2d 560, 567 (2d Cir. 1969) (tracing modern Supreme Court due process analysis of land use regulations).

8. A problem arises, however, if the government eliminates statutory entitlements by means of arbitrary delay or denial of a land use permit. Beginning in March of 1979, it is possible that the District's DHCD began using the regulations not as a tool of orderly processing but as a tool for impeding conversion entirely. (Finding of Fact, ¶ 14). Though conversion of a building approximately the size of Van Ness South could be completed within three weeks (Finding of Fact, ¶ 12), between March 12, 1979 and May 29, 1979, no new high rent or tenant consent conversions were granted or denied (Finding of Fact, ¶ 15). Yet the DHCD was handling

an unusually large number of applications at this time which invariably slows down the processing time. (Finding of Fact, ¶ 15). Further, processing of applications for both large and small buildings did continue throughout this period. (Finding of Fact, ¶ 15). Plaintiffs, filed their applications on April 26, 1979. Failure to issue a C/E or a C/Ex to plaintiffs within a one-month time period under such circumstances does not constitute a deprivation of due process. Plaintiffs had no right to expect conversion permission within such a short period of time.

9. Nor does the failure to permit conversion during the one week period from April 25, 1979 to May 4, 1979 when technically there was no statutory prohibition against cooperative conversions (Finding of Fact, ¶ 8) rise to the level of being a deprivation of due process. This is an extremely short interim period when it was undoubtedly unclear to DHCD and its personnel what procedures they were operating under. Failure to issue immediately C/Ex's for all pending applications during this period cannot be considered a curtailment of plaintiffs' private rights. Plaintiffs could not have reasonably anticipated such a "window" of conversion; therefore denying it to them is not a deprivation of an investment-backed expectation.

10. The moratorium enacted May 4, 1979, was a proper exercise of the District's emergency powers. *Washington Home Ownership Council, Inc. v. District of Columbia*, No. 10024-79 (D.C. Sup. Ct. Oct 19, 1979). The successive moratoria enacted beginning August 27, 1979 were unlawful *Id.* Judge Revercomb reasoned that:

> It is unnecessary to cite authority for the proposition that tenants in an apartment house do have a vested property interest. If this Court were to give retroactive effect to its prior order, a significant number of District residents would be immediately

> or eventually displaced. Many of the displaced tenants would be the elderly, persons probably unable fully to bear or to shift the cost of the District's error. Many of these persons would encounter significantly higher rents or, worse, no reasonable affordable vacancies at all.

Id. at 11. Thus the Superior Court found that its own order (regarding the legality of the successive moritoria) must be stripped of any legal significance. That finding is not binding on this court and these parties as a matter of res judicata or collateral estoppel. *See Silverman v. Barry*, No. 81-394 Mem. & Order (D.D.C. Feb. 14, 1985) (Flannery, J.). Yet as a matter of comity, this court respects the Superior Court's finding that the striking down of the emergency legislation would have prospective effect only (Finding of Fact, ¶ 22). Judge Revercomb appropriately considered the harm of retroactive application of his ruling and balanced this against the right of property owners. Adherence to the retroactivity doctrine would provide an overly simplistic and mechanical solution to a complex problem, would seriously disrupt the settled fiscal expectations of the District, and would seriously disturb the settled expectations of those persons who relied on the successive emergency legislation as substantive rules of decision. On this basis, Judge Revercomb ruled that the successive statutes passed pursuant to Section 412(a) of the Home Rule Act prior to August 28, 1980 were of full force and effect until August 28, 1980. This court agrees that prospective application only is appropriate and therefore does not find that failure to permit conversions during this time period is a deprivation of due process. This period ended with the expiration of the D.C. Court of Appeals mandate on August 28, 1980.

11. The use of tenant consent as a prerequisite to conversion is not an impermissible delegation of legislative authority to tenants. This is a reasonable method

for determining whether a majority of tenants wish to convert, as was required by the law at that time. This is a land use provision that protects the public welfare and merely allows the tenants to waive a prohibition enacted for their benefit. *See Thomas Cusack Co. v. Chicago*, 242 U.S. 526, 37 S. Ct. 190 (1917). Clearly it would have been preferable if plaintiffs and defendants established explicitly from the start the ground rules by which a "consent" would be deemed a true consent. Yet the confusion surrounding Van Ness South in this regard, with verifications and revocations of consent regularly being submitted to DHCD, amply justifies the use of a more accurate method of ascertaining consent, such as notarization or telephone confirmation. (Findings of Fact, ¶¶ 28, 29). The confusion further explains the slowness in the District's ability to process the applications. Thus defendants' conduct did not constitute a violation of Sections 302 and 412(a) of the Home Rule Act, 1 D.C. Code §§ 1-124 and 1-146 (Supp. VII 1980) and withholding of the conversion permits was properly done. The District was under no obligation to accept notarized consents during non-business hours.

12. By August 28, 1980, the District had enacted permanent legislation regarding conversion. (Finding of Fact, ¶ 31). Plaintiffs failed to satisfy the requirements under this process of conversion. This new legislation is not irrational and is not unconstitutional.

13. Defendants Barry, Moore, and Stokes are not liable for § 1983 violations in that they acted pursuant to constitutional laws, regulations, and policies.

14. The totality of these events suggests that the District was going through a period during which conversions to cooperative and condominium were to be done differently under D.C. law. While the conduct of the DHCD and the passage of successive emergency acts suggest a protracted effort by the District to deal with

the problem of massive conversions, insufficient evidence exists to show the District's actions prior to passage of permanent legislation to be a deprivation of plaintiffs' rights in their property. The acts of the District are discretionary to a point before they become a deprivation of due process: that point was not reached. Each of the statutes was rationally related to a governmental purpose. Each of the regulations or policies exercised in this case was within the statutory authority. Further, each of the administrative actions taken was pursuant to the regulations or policies. Though the value of plaintiffs' property rights was decreased, plaintiffs continued to receive income from the rental property right up until the time it was sold for $27 million. All economically viable use of the property was not obliterated, an important factor in considering such a "taking." *See Penn Central Trans. Co. v. New York*, 438 U.S 104, 129-30, 98 S. Ct. 2646, 2661-62.

15. Plaintiffs have not carried their burden of showing that there has been a violation of the Fifth Amendment, a violation of 42 US.C. § 1983, or a violation of the D.C. Home Rule Act. Therefore, this court finds plaintiffs are not entitled to any relief.

An appropriate Order accompanies these Findings of Fact and Conclusions of Law.

/s/ Thomas A. Flannery
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-0394

ROBERT I. SILVERMAN, *et al.*,
Plaintiffs,

v.

MARION BARRY, Mayor of the District of Columbia, *et al.*,
Defendants.

Filed Aug. 22, 1986

ORDER AND JUDGMENT

This matter came before the court for a non-jury trial on April 7, 1986. Upon hearing the opening arguments of counsel and receiving into evidence certain exhibits, the court agreed with the parties that this matter could proceed without oral testimony. After submission of further exhibits and of proposed findings of fact and conclusions of law by all parties, this court heard closing argument on May 15, 1986. After consideration of the parties' proposed findings of fact and conclusions of law, it is, by the court, this 21st day of August, 1986,

ORDERED, ADJUDGED AND DECREED that judgment is for defendant and defendant-intervenor; and it is further

ORDERED that this matter is dismissed with prejudice.

/s/ Thomas A. Flannery
United States District Judge

APPENDIX D

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 83-242

DAVID HORNSTEIN, *et al.*,
Appellants,

v.

MARION BARRY, *et al.*,
Appellees.

Appeal from the Superior Court
of the District of Columbia

(Hon. John F. Doyle, Trial Judge)

(Argued April 24, 1984 Decided September 11, 1987)

Burton Schwalb, with whom *Laura A. Kumin* and *Patricia L. Maher* were on the brief, for appellants. *Jerome Nelson* also entered an appearance for appellants.

Lutz Alexander Prager, Assistant Corporation Counsel, with whom *Inez Smith Reid*, Corporation Counsel, *John H. Suda*, Principal Deputy Corporation Counsel, respectively, at the time the brief was filed, and *Charles L. Reischel*, Deputy Corporation Counsel, were on the brief, for appellees.

Before FERREN and TERRY, *Associate Judges*, and REILLY, *Senior Judge*.

PER CURIAM: This appeal by the title holders of a residential apartment building from an entry of summary judgment and dismissal of the complaint in an action against the District of Columbia government (and certain named officials) raises several issues including a challenge to the constitutionality of the Rental Housing

Conversion and Sale Act of 1980, D.C. Code § 45-1601, *et seq.* (1981). We affirm in part, reverse in part, and remand for trial one issue on which we deem disposition by summary judgment not appropriate.

In this complaint, appellants—sole trustees of a trust which includes the ownership of the Savoy, a 203 unit apartment structure at 1101 New Hampshire Avenue, N.W.—alleged that the Department of Housing and Community Development (the Department), the agency which administers the municipal laws relating to condominium conversion, wrongfully refused to accept and process an application to change the Savoy rental units into condominia. The complaint also assailed as unconstitutional a provision of the Act which makes a consent by the majority of current tenants a condition precedent to conversion and asserted that the operation of the conversion statute in conjunction with District rent control laws disregarded a provision of the Fifth Amendment which forbids "private property [to] be taken for public use, without just compensation." The following facts appear to be undisputed in the record.

On December 29, 1978, the Department issued a certificate of eligibility to appellants to convert the Savoy into condominia based on an application and showing that it qualified as a "high rent" housing accommodation under the later repealed Section 501 of the Condominium Act of 1976, D.C. Code § 5-1281(b)(1)(A) (Supp. V 1978).[1] Section 406 of this Act, still in force and incorporated into existing law as D.C. Code §§ 45-1863, -1866 (1981), provides that once an owner obtains such a cer-

[1] This section of the 1976 Act provided:

> A housing accommodation or rental unit in the District of Columbia may be converted into a condominium,
>
> > (A) if that housing accommodation is a high rent housing accommodation or if that rental unit is located in a high rent housing accommodation at anytime after March 27, 1977.

tificate, he must then file an additional instrument, *viz.*, an application for registration, before he is authorized to sell a rental unit as a condominium. Within five days after receiving such an application for registration, the District issues a "notice of filing" to the applicant acknowledging receipt of the application. Thereafter, the District reviews the application and within a sixty day period accepts or rejects it. If no action is taken within this period, the condominium is deemed "registered" unless the applicant has consented in writing to the delay.

On May 29, 1979, the District Council passed the first of a series of emergency acts declaring a 90-day moratorium on "high rent" conversions.[2] These acts were adopted by the Council for the stated purpose of preventing further depletion of the rental housing supply of rental accommodations in the District—a condition of affairs which the Council found to be aggravated by the growing number of conversions of rental properties to condominia and cooperatives. D.C. Code § 45-1601(3) (1981). This Act limited the Mayor's authority to honor certificates of eligibility based on the high rent exemption should the holder file the additional instruments required for conversion.

When the 90 days—the maximum period for which emergency legislation could be effective under the Home Rule Act[3]—expired, the Council again invoking its "emergency" powers, passed successive, substantially identical 90 day acts.

The validity of these acts was attacked by another party in an action for declaratory judgment and injunc-

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[2] These measures included the Emergency Condominium and Cooperative Stabilization Act of 1979, D.C. Act 3-44, 25 D.C. Reg. 10363 (June 1, 1979); D.C. Act 3-95, 27 D.C. Reg. 1014 (August 31, 1979); D.C. Act 3-132, 26 D.C. Reg. 2436 (November 30, 1979); and D.C. Act 3-151, 27 D.C. Reg. 844 (February 29, 1980).

[3] D.C. Code § 1-146(a) (1979 Supp.).

tive relief on the ground that the Council was in effect enacting legislation of a permanent nature under the guise of an emergency, thereby unlawfully avoiding statutory Congressional review. The trial court agreed with this contention and granted an injunction which was stayed pending appellate review.[4] We affirmed the trial court, *District of Columbia v. Washington Home Ownership Council, Inc.*, 415 A.2d 1349 (D.C. 1980) (en banc), but stayed our mandate for 90 days.

This opinion was released on May 20, 1980. More than two months later—on July 25 of that year—appellants, assuming that there was no longer any valid legislation barring the second procedural step to the conversion of high rent apartments, acted upon their certificate of eligibility and filed an application with the Department to register the Savoy as a condominium.

They apparently had overlooked the impact of intervening Council action. Conversions were controlled at that time by D.C. Law 3-53, entitled the Condominium and Cooperative Stabilization Act of 1979, 27 D.C. Reg. 34 (1980), enacted by the Council while the appeal was pending. The Act was submitted to Congress for review. After the expiration of the statutory review period, and in the absence of a disapproval resolution, it became effective on February 23, 1980, and was in force for 180 days thereafter. This Act provided that "the Mayor shall not issue any notice of filing of an application for registration of a condominium pursuant to [the procedure set forth in] § 406 of the Condominium Act of 1976 if that housing accommodation was declared eligible to convert pursuant to § 501(b)(1)(A) [the high rent section] of the Act." 27 D.C. Reg. 37-38 (1980). Under D.C. Law 3-53, notice of filings could be issued only to owners who had applied for registration (as opposed to obtaining a certificate of eligibility) *before* May 1979, purchased

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[4] *Washington Home Ownership Council, Inc. v. District of Columbia*, Civil Action No. 10624-79 (Super. Ct. Oct. 19, 1979).

units in contemplation of conversion, served tenants with notice of intent to convert, made "substantial financial investment" toward conversion or had obtained tenants' consent to the conversion.

Even though appellants' application failed to qualify under these new requirements, the Department, also in apparent ignorance of Law 3-53, issued a notice of filing to appellants on July 28, 1980. Three weeks later, on August 19, 1980, the Department realized its error. It notified appellants' counsel of its mistake, and informed him that appellants' application for registration would have to be returned as incomplete because it did not include a certificate of eligibility to convert to condominia based on tenant consent. In an effort to resolve the problem, the parties agreed that the Department would retain the Savoy's application until the Superior Court issued an order pursuant to a remand of the *Home Ownership Council, supra* note 4, decision.

In August and September of 1980, the District enacted still stricter legislation regarding condominium conversion. *See* Rental Housing Conversion and Sale Act of 1980, D.C. Law 3-86, D.C. Code § 45-1601 *et seq.* (1981) (hereinafter September 1980 Act). This new legislation recognized only two kinds of conversions: those which had been approved by a majority of the qualified tenant voters[5] and those for which a notice of filing was issued prior to September 10, 1980, the effective date of the Act. D.C. Law 3-86, § 210, 27 D.C. Reg. 2975, 2985-86.

On December 3, 1980, the Superior Court issued an opinion and order holding that its prior judgment declaring the interim emergency acts invalid, should be given a "purely prospective application" and that all statutes passed prior to August 28, 1980 were of full force and

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[5] A qualified voter is a tenant who resides in the rental unit as a principal place of residence, is a domiciliary of the District, and pays at least one-half of the cost of maintaining the rental unit. D.C. Code §§ 45-1603 (9), -1612 (i) (1981).

effect until that date. *See Washington Home Owners Council, Inc. v. District of Columbia,* Civil Action No. 10624-79 (December 3, 1980). No appeal was taken. On December 23, the District returned appellants' registration application unprocessed.

In May 1981, appellants filed a three count complaint in the Superior Court. In the first count, appellants challenged the rejection of its application for conversion, asserting they qualified under the § 210 grandfather clause of the September 1980 Act because they possessed a previously issued notice of filing and hence the tenant election provision was inapplicable. The second count alleged that they were entitled to relief because the invalid emergency acts precluded them from completing what would have been a lawful conversion. Finally, appellants complained that the tenant consent provision of the September 1980 Act unconstitutionally delegated governmental authority to the tenants, and that the Act alone, or in combination with the District's rent control laws, operated to take unlawfully private property without just compensation in violation of the Fifth Amendment. The complaint sought declaratory and injunctive relief, as well as monetary damages.

The District filed a motion to dismiss the complaint, or in the alternative, to grant summary judgment as to each count. Appellants similarly filed a cross motion for summary judgment. The trial court by order of January 28, 1983, granted the District's motion and dismissed appellants' complaint with prejudice. This appeal followed.

I

Appellants' position is that the trial court erred as a matter of law in granting the District's motion for summary judgment. Summary judgment is an appropriate remedy when there are no material facts in issue and when it is clear that the moving party is entitled to judgment as matter of law. *Swann v. Waldman,* 465 A.2d

844, 846 (D.C. 1983); *Burch v. Amsterdam Corp.*, 366 A.2d 1079, 1083-84 (D.C. 1976); Super. Ct. Civ. R. 56(c). The burden of demonstrating the absence of a genuine issue of material fact is upon the movant. *Himmelfarb v. Greenspoon*, 411 A.2d 979, 983 (D.C. 1980).

Appellants advance a number of reasons to support its argument that the Department wrongfully refused to process the application for registration. The most cogent is that the Department should have honored the notice of filing it isued on July 28, 1980, because Section 210 of the September 1980 Act, as we have pointed out, did not prevent conversions based upon issuance of such notices before September 10, the date the new Act became effective.[6]

This argument would carry great weight with us on the premise that the September 1980 Act had implicitly limited the impact of D.C. Law 3-53 on pending applications for conversion were it not for the fact that the notice of filing upon which appellants rely had been revoked prior to September 10.

When appellants received notice of filing, the Department was prohibited from issuing notices to "high rent" housing accommodations under then controlling D.C. Law 3-53. Thus, despite the Savoy's certificate of eligibility based on its high rent status, the Department was without authority to issue such a notice. Hence, its prompt revocation of this document was merely a notification to the applicants that its inadvertent action was not valid

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[6] Section 210 provided in pertinent part:

> This title applies to conversion of housing accommodations into condominium or cooperative status for which no notice of filing is issued pursuant to Section 406 of the Condominium Act [of 1976] (D.C. Code § 5-1266 (Supp. V 1978)) . . . prior to the effective date of this title.

The successor to this section, substantially identical in effect, is at D.C. Code § 45-1618 (1981).

under D.C. Law 3-53. In the context of the then existing statutes, we cannot hold such revocation improper. As the facts are not in dispute, the court's rejection of this argument on summary judgment will not be disturbed.

Appellants also contend that their motion for summary judgment should have been sustained because the successive moratoria on the conversion of high rent apartments which the Council enacted after they had received certificates of eligibility were illegal, as this court eventually held in the *Washington Home Ownership Council* case, *supra*. Granted that the passage of such legislation may have discouraged appellants from filing the second instrument required for approval of condominium conversion, we cannot hold that in the posture of this case appellants were aggrieved by these impermissible actions of the municipal legislative body. No application to further the conversion of the Savoy units into condominia was made while this "emergency" legislation was in effect. Nor were appellants parties to the litigation which culminated in our en banc holding declaring such legislation in excess of the statutory power of the Council. By the time appellants did file the requisite application for registration, the improper legislation was no longer on the books, having been replaced by D.C. Law 3-53. This Act was unaffected by the decisions relating to the preceding emergency acts, for it was not made effective until the period for congressional review had elapsed. As the Department acted under the authority of this law, not the invalidated legislation, in refusing to process the Savoy application, it appears that the action of the District officials was not violative of the controlling statute.

II

Appellants challenge the constitutionality of the statute under which the Department denied its condominium application. More specifically, the complaint asserts that requiring the consent of a majority of rental tenants to

a conversion unconstitutionally delegates to private citizens the legislative power granted by Congress to the Council. The Rental Housing Conversion and Sale Act conditions any proposed condominium conversion upon the approval of a majority vote of eligible tenants in a tenant election.[7] D.C. Code §§ 45-1611, -1612 (1986 Replacement). Section 45-1611(a)(1) prohibits any conversion until the Mayor has certified compliance with the provisions of the Act. And § 45-1612(j) provides that "if 50 percent or less of the qualified voters vote in approval of conversion, or if an election is invalidated by the Mayor because of fraud or coercion in favor of conversion on the part of the owner, the Mayor shall not certify compliance with this section for purposes of conversion, and an owner may not request another tenant election for that accommodation for 1 year from the date of election." Thus, it is apparent that, under the statute, a majority of eligible tenant voters can veto any proposed condominium conversion. Appellants' failure to conduct such an election does not foreclose consideration of their challenge to the tenant consent provision of the statute. Appellants do not challenge a specific application of the tenant consent provisions but rather contend that it is facially unconstitutional. As such, they may raise this claim without being required to conduct such an election. *See Town of Gardiner v. Stanley Orchards, Inc.*, 105

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[7] D.C. Code § 45-1612 (d) (1986 Replacement) defines qualified tenant voters:

> *Qualified voter.*—A head of household residing in each rental unit of the housing accommodation is qualified to vote unless no member of the household has resided in the accommodation for at least 90 days before the election, or unless a member of the household is or has been an employee of the owner within 120 days prior to the date of application for eligibility, or unless he or she is a head of household whose continued right to remain a tenant is required by this chapter. The Mayor shall determine the eligibility of voters prior to the election and shall devise such forms and procedures as may be necessary to verify eligibility under this subsection.

Misc. 2d 460, ——, 432 N.Y.S.2d 335, 338 (1980). Moreover, appellees do not argue otherwise.

The United States Court of Appeals for the District of Columbia Circuit has noted—without deciding the issue—that such a claim does raise a substantial federal question. *See Silverman v. Barry*, 234 U.S. App. D.C. 22, 27, 727 F.2d 1121, 1126 (1984). Unfortunately, it is not clear whether certain Supreme Court decisions in which such legislative delegation has been invalidated have significant bearing upon similar restrictions concerning condominium conversions. *See* Note, *The Validity of Ordinances Limiting Condominium Conversions*, 78 MICH. L. REV. 124, 135-41 (1979); *Development in the Law—Zoning*, 91 HARV. L. REV. 1427, 1532-42 (1978). An analysis of the leading cases discussing the propriety of legislation contingent upon the approval of private individuals reveals a fine and often confusing dividing line between constitutional and unconstitutional delegation.

In *Eubank v. City of Richmond*, 226 U.S. 137 (1912), the Supreme Court held unconstitutional an ordinance which directed the city committee on streets to establish a building line (prohibiting the construction of buildings within the limits of such line) whenever two-thirds of the abutting landowners requested it. The Court found that the statute left no discretion to the committee in such a case and conferred 'the power on some property owners to virtually control and dispose of the property rights of others [while the statute] creates no standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest or even capriciously." *Id.* at 143-44.

In rejecting appellants' reliance upon *Eubank*, the trial court in its memorandum opinion in this case cited *Cusack Co. v. City of Chicago*, 242 U.S. 526 (1917), upholding an ordinance, based on a legislative finding that billboards in residential areas were a nuisance, pro-

hibiting the erection of any billboard in such an area unless a majority of abutting property owners consented. The Supreme Court held that to permit a waiver of an otherwise applicable prohibition by persons for whose protection the law was enacted "is not a delegation of legislative power, but is . . . a familiar provision affecting the enforcement of laws and ordinances." *Cusack, supra,* 242 U.S. at 531. The Court distinguished *Eubank, supra,* on the ground that, in contrast to a prohibition that could be waived by a majority of those most directly affected by it, the challenged building line ordinance "left the establishment of the building untouched until the lot owners should act and then made the street committee the mere automatic register of that action and gave to it the effect of law." *Cusack, supra,* 242 U.S. at 531.

The force of this distinction between an ordinance that allows a small group of citizens to impose a restriction upon a property owner, and one which allows the same group to waive a prohibition designed for its protection, was severely weakened in *Washington ex rel. Seattle Title Trust Co. v. Roberge,* 278 U.S. 116 (1928). In *Roberge,* the Court struck down a Seattle ordinance conditioning construction of a philanthropic home for elderly indigents on the consent of two-thirds of property owners within four hundred feet of the proposed structure. "A comprehensive zoning ordinance . . . divided the city into six use districts and provided that . . . no building should be erected for any other purpose other than that permitted in the district in which the site is located." *Id.* at 117. The permitted uses did not include a philanthropic home. An amendment to the comprehensive zoning ordinance, however, provided that "[a] philanthropic home for children or for old people shall be permitted in First Residence District when the written consent shall have been obtained of the owners of two-thirds of the property within four hundred (400) feet of the proposed building." *Id.* at 118. Relying on *Eubank, supra,* the

Court struck down the ordinance as an "arbitrary" delegation of power "repugnant to the due process clause of the Fourteenth Amendment." *Id.* at 122-23. The Court distinguished *Cusack, supra,* by noting that it involved a legislative finding that billboards constituted a nuisance and were likely to endanger the safety and decency of the areas from which they were prohibited. In sharp contrast, in *Roberge, supra,* no similar finding existed to show that the construction of a philanthropic home would be a nuisance.

The three foregoing holdings are not easy to reconcile. We recognize that "some courts have upheld consent requirements by regarding the consent of the landowner as a waiver of an existing restriction, rather than the imposition of a restriction." 3 ANDERSON, AMERICAN LAW OF ZONING § 21.15, at 700 (3d ed. 1986). *See, e.g., Arno v. Alcoholic Beverages Commission,* 377 Mass. 83, ——, 384 N.E.2d 1223, 1227 (1979); *State Theatre Co. v. Smith,* 276 N.W.2d 259, 263 (S.D. 1979); *Marta v. Sullivan,* 248 A.2d 608 (Del. 1968); *Robwood Advertising Associates, Inc. v. City of Nashua,* 102 N.H. 215, ——, 153 A.2d 787, 789 (1959); *Cross v. Bilett,* 122 Colo. 278, 221 P.2d 923 (1950); *DuPont v. Liquor Control Commission,* 136 Conn. 286, 71 A.2d 84 (1949). Assuming that the limitations on condominium conversions can accurately be characterized as a prohibition, with a waiver provision, we conclude in any event that this distinction is not controlling. We agree with the Illinois Supreme Court that "the subtle distinction between 'creating' and 'waiving' a restriction cannot be justified." *Drovers Trust & Savings Bank v. City of Chicago,* 18 Ill.2d 476, 478, 165 N.E.2d 314, 315 (1960). *See also* Note, *The Validity of Ordinances Limiting Condominium Conversions,* 78 MICH. L. REV. 124, 137-38 (1979). The same concerns of arbitrariness, capriciousness and lack of standards remain identical in both situations. *See id.* at 137 ("Laws that accommodate that formalistic

standard may still permit neighbors to prohibit unwanted uses capriciously.").

In any event, in 1976 the Supreme Court again considered the delegation issue in *City of Eastlake v. Forest City Enterprises*, 426 U.S. 688 (1976). Although presented with an opportunity to overrule *Eubank*, *supra*, and *Roberge*, *supra*, the Court instead distinguished them. At issue in *Eastlake* was a municipal ordinance which not only required approval by the city council of any application by a landowner for a deviation from the use prescribed by a city wide zoning plan, but also conditioned the effectiveness of such approval upon a 55% voter ratification in a popular referendum. In sustaining the constitutionality of the latter condition, the Court declared a referendum in which all registered voters in the municipality could participate merely as a proper deference of the legislative body to the reserved power of the people from whom all governmental authority is derived. It concluded that a referendum "cannot . . . be characterized as a delegation of power." *Eastlake*, *supra*, 426 U.S. at 672. The majority opinion (from which three Justices dissented), in refusing to follow *Eubank* and *Roberge*, characterized those decisions as dealing with delegation to a "*narrow segment* of the community, not the people at large," *Eastlake*, *supra*, 426 U.S. at 677 (emphasis in original), and went on to say:

> Neither *Eubank* nor *Roberge* involved a referendum procedure such as we have in this case; the standardless delegation of power to a limited group of property owners condemned by the Court . . . is not to be equated with decision-making by the people through the referendum process.

Id. at 678.

In light of these observations, appellants' argument that the challenged statute allows a cluster of tenants who have a financial interest in preventing their rental

units from conversion actually to prohibit such conversion has considerable force. Certainly, it cannot be denied that a group of tenants in a given building—and not all tenants at that—falls into category of a "narrow segment of the community." *Id.* at 677. Furthermore, while it is true that the *Eastlake* opinion did not overrule *Cusack*, whatever vitality it retains must still be viewed in light of *Roberge*. As in *Roberge*, there has been no finding here that the conversion of an already existing building from rental units to condominium units would constitute a nuisance. Conversion from rental units to condominia is simply not analogous to the construction of billboards. The findings in D.C. Code § 45-1601 (1986 Replacement) detailing the shortage of rental units in the District of Columbia, especially for those with low incomes, and the effects of condominium conversions on those shortages do not amount to a determination that such conversions would constitute a nuisance in the traditional sense in which that term has been used. We decline to read that much into the Council's legislative findings. In short, we do not believe that the Council's understandable concerns about the shortage of rental units are the same as those expressed in *Cusack* and the absence of which was deemed fatal in *Roberge*.

Contrary to appellees' argument, the Supreme Court's decision in *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96 (1978), does not support the validity of the tenant consent provision of the Condominium Conversion Act. In *Fox*, the Court faced a constitutional challenge to the California Automobile Franchise Act. The Act permitted a state regulatory agency (New Motor Vehicle Board) to delay an automobile manufacturer from granting a franchise if a competing franchisee filed a protest. Upon the filing of such a protest, the New Motor Vehicle Board notified the applicant that such a protest had been filed and that the proposed dealership could not be established until the Board had

held hearings and made a determination that the proposed dealership was not contrary to the public interest. In rejecting the challenge to this statutory scheme, the Court, citing *Cusack*, stated that "An otherwise valid regulation is not rendered invalid simply because those whom the regulation is designed to safeguard may elect to forgo its protection." *Fox, supra*, 439 U.S. at 109. This comment, however, must be read in context. There can be no dispute that one individual may decide to waive any right he or she may have. For example, as the Court noted, "Court approval of an eviction . . . becomes necessary only when the tenant protests his eviction, and he alone decides whether he will protest." *Id.*

Additionally, in *Fox*, in contrast to the situation before us, a protest would only have the effect of triggering a hearing before the New Motor Vehicle Board. The ultimate decision on whether to allow a new franchise to be established was left to the Board acting in the public interest. Competitors were not in the position of being able to veto new franchises. Under the statute at issue here, however, the tenants possess an absolute, unreviewable veto power over any condominium conversion. Consequently, the statute "provides no standard whatsoever by which the consents may be judged." *Shannon v. City of Forsyth*, 666 P.2d 750, 753 (Mont. 1983).[8] As the statutory provision challenged here is deficient in the same respect, it cannot be sustained.

Having reached this conclusion, we wish to emphasize the narrow limits of our decision. We do not mean to suggest that the legitimate concerns of tenants lack relevance in determining whether a particular conversion should be permitted. For example, an act of the Council conditioning agency approval of a proposed condominium conversion upon prior notice to tenants and an opportu-

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[8] *See also Drovers Trust and Savings Bank*, 18 Ill. 2d at 478, 165 N.E.2d at 315; *Lakin v. City of Peoria*, 129 Ill. App. 3d 651, ——, 472 N.E.2d 1233, 1236 (1984).

nity for them to voice their concerns would not raise the constitutional issue we have discussed. *Cf. Fox, supra.* The final decision, however, must be made by a governmental agency according to some enunciated standards.[9] It cannot simply be left to the unreviewable whims of "a narrow segment of the community." *Eastlake, supra,* 426 U.S. at 677.

III

It is one thing to hold that restrictions on land may be within the police or eminent domain powers of a legislative body, but quite another to say that such powers may be exercised without regard to the Fifth Amendment prohibition against the uncompensated taking of private property. In one count of their complaint, appellants alleged that combined effect of the local rent control and condominium statutes did indeed amount to such a taking. Although the trial court did not comment on this allegation in its memorandum opinion, its sweeping summary judgment order rejected this claim.

In our opinion, the trial court erred in disposing of this contention by summary judgment, for appellants' claim did raise issues of material fact. It is true that a showing that a legislative restriction on land use (*e.g.*, rent control, preservation of historic landmarks, etc.)

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[9] Appellees contend that a decision invalidating the consent provision would lead to the ironical result that the prohibition on conversions would become absolute. *See* D.C. Code § 45-1663 (1986 Replacement) (Savings Clause). Appellants counter with the argument that "it is difficult to imagine . . . that such an absolute provision . . . could withstand a constitutional attack." We express no views on either appellees' claim that invalidating the tenant consent will lead to an absolute prohibition on conversions or on appellants' counter-argument that such a prohibition would be unconstitutional. Rather, we leave it to the trial court on remand to determine what effect our invalidation of the tenant consent provision has on the remainder of the statute, taking into account the whole framework of the statute and any other arguments the parties may offer.

will diminish the market value of a given piece of real estate is not sufficient to establish an illegal taking, if alternate uses survive which provide an aggrieved owner a reasonable financial return. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978); *900 G. Street Associates v. District of Columbia*, 430 A.2d 1387, 1391 (DC. 1981). *See also First English Evangelical Church of Glendale v. County of Los Angeles*, —— U.S. ——, 107 S. Ct. 2378, 2388-89 (1987).

The trial court made no factual inquiry whether such alternative economic uses were available, however. Hence, it was premature to dismiss appellants' taking claim on the pleadings because resolution of this issue requires an "essentially *ad hoc* factual inquiry," *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1983). The inquiry should include evidence "with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances." *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 295 (1981). *See also Silverman v. Barry*, 234 U.S. App. D.C. at 27, 727 F.2d at 1126.

Inasmuch as an issue of material fact remains which is not amenable to resolution as a matter of law, we must remand the case for a factual determination on appellants' assertion that the Conversion Act, alone or in conjunction with the rent control laws, deprives them of their property without just compensation.[10]

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

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[10] After this case had been briefed and argued, the Corporation Counsel, in continuing to argue for affirmance, drew our attention to an unpublished opinion of the United States District Court disposing of the remand in the *Silverman* case, *supra; Silverman v. Barry*, Civ. No. 81-0394 (D.D.C. August 22, 1986), *appeal filed*, No. 86-7037 (D.C. Cir. September 12, 1986). The trial court, after

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making extensive findings of fact, concluded that the financial loss incurred by the sellers of an apartment complex because of their inability to execute a prior contract of sale conditioned upon successful condominium conversion, did not entitle them to damages as "all economically viable use of the property was not obliterated," citing *Penn Central v. New York, supra,* 438 U.S. at 129-30. While we respect the court's analysis, we do not think this decision should bar appellants in this case from presenting evidence to sustain their claim of a deprivation of Fifth Amendment rights. If one accepts the reasoning of a recent decision of the Court of Appeals for the Ninth Circuit, *Hall v. City of Santa Barbara,* 813 F.2d 198 (9th Cir. 1987), it may be that the enhanced tenure of tenants resulting from a rejection of a condominium conversion constitutes a transfer of a possessory interest in land—and thus a "taking."

APPENDIX E

APPLICABLE PROVISIONS OF CONDOMINIUM ACT OF 1976 IN EFFECT FROM BEFORE JANUARY 1, 1979 UNTIL MAY 29, 1979

Sec. 501.(a) Notwithstanding any other provision of law, no person may convert nor shall the Mayor permit the conversion of any housing accommodation or rental unit in the District of Columbia into a condominium, except as provided in this title.

(b)(1) A housing accommodation or rental unit in the District of Columbia may be converted into a condominium—

(A) if that housing accommodation is a high rent housing accommodation is not a high rent housing accomin a high rent housing accommodation, at any time after the effective date of this title; or

(B) except as provided in paragraph (2), if that housing accommodation or if that rental unit is located modation or if that rental unit is located in a housing accommodation which is not a high rent housing accommodation, at any time after the effective date of this title at which the most recently computed vacancy rate (computed according to the procedure set forth upon the enactment of the Condominium act of 1976, Bill 1-179, adopted by the Council July 20, 1976 effective at the end of the thirty day period, provided for Congressional review of acts of the Council under section 602(c) of the District of Columbia Self-Government and Governmental Reorganization Act) higher than 3 percent. For the purposes of this title, the term "high rent housing accommodation" includes any housing accommodation in the District of Columbia for which the total monthly rent exceeds an amount computed for such housing accommodation as follows:

(i) multiply the number of rental units in the following categories by the corresponding rent: (I) $212.50 for one bedroom rental units; (II) $267 for two bedroom rental units. (III) $375 for three or more bedroom rental units; and (IV) $162.50 for efficiency rental units; and

(ii) total the results obtained in phase (i).

(2) Any housing accommodation which is not a high rent housing accommodation may be converted to a condominium, notwithstanding a vacancy rate of 3 percent or less, if at least a majority of the heads of households actually residing in such housing accommodation, as of the first day of the month in which the application relating to the registration of such housing accommodation is filed, have signed a written agreement consenting to such conversion. If a majority of the heads of households in such housing accommodation have signed such written agreements, but the conversion has not taken place, then the landlord of that housing accommodation shall notify each prospective tenant of that housing accommodation that a majority of the heads of households in that housing accommodation have signed such agreements. No landlord or declarant shall use any means whatsoever to coerce any person into signing such an agreement.

AN ACT

2-309

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

November 30, 1978

To amend, on an emergency basis, the Condominium Act of 1976 (D.C. Law 1-89).

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Fourth Condominium Conversion Emergency Act of 1978".

Sec. 2. (a) The term "high rent housing accommodation", as defined in the Condominium Act of 1976, effective March 29, 1977 (D.C. Law 1-89), for the purposes of title V of said law, needs to be redefined because the rent levels for the four (4) housing categories to which D.C. Law 1-89 applies do not reflect present rent levels in the District of Columbia.

(b) It is the intent of the Council of the District of Columbia to redefine the term "high rent housing accommodation" by setting new rent floor levels which in no instance shall be lower than the fair market rent levels set for elevator apartments in the Washington Metropolitan Area by Section 8 of the Housing Assistance Program established by the Housing and Community Development Act of 1974 (P.L. 93-383).

Sec. 3. (a) Section 501(b)(1)(B)(i) of the Condominium Act of 1976, effective March 29, 1977 (D.C. Law 1-89), is amended to read as follows:

"(i) multiply the number of rental units in the following categories by the corresponding rent: (I) $267 for one bedroom rental units; (II) $314 for two bedroom rental units; (III) $408 for three or more bedroom rental units; and (IV) $221 for efficiency rental units; and".

(b) The provisions of this act shall govern certificates of eligibility to convert rental units to condominiums issued on or after the effective date of this act.

Sec. 4. This act shall take effect on November 19, 1978, which is the expiration date of the Third Condominium Conversion Emergency Act of 1978, effective August 21, 1978 (Act 2-272), and shall remain in effect for no longer than ninety (90) days as provided for emergency acts of the Council of the District of Columbia in section 412(a) of the District of Columbia Self-Government and Governmental Reorganization Act.

Emergency Legislation

Effective: February 23, 1979

Expires: May 24, 1979

AN ACT

3-10

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

To amend, on an emergency basis, the Condominium Act of 1976 (D.C. Law 1-89).

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "First Condominium Conversion Emergency Act of 1979".

Sec. 2. Statement of Findings and Purposes.

(a) The term "high rent housing accommodation", as defined in Title V of the Condominium Act of 1976, effective March 29, 1977 (D.C. Law 1-89), requires redefinition because the rent levels established for the four (4) housing categories in said law do not reflect present rent levels in the District of Columbia.

(b) It is the intent of the Council of the District of Columbia to redefine the term "high rent housing accommodation" which in no instance shall be lower than the fair market rent levels set for elevator or non-elevator (as appropriate) apartments in the Washington Metropolitan Area by the Section 8 Housing Assistance Program established by the "Housing and Community Development Act of 1974" (P.L. 93-383; 88 Stat. 721).

Sec. 3. Section 501(b)(1)(B) of the "Condominium Act of 1976", effective March 29, 1977 (D.C. Law 1-89), is amended to read as follows:

"(i) multiply the number of rental units in the following categories by the corresponding rents established by the United States Department of Housing and Urban Development for the District of Columbia as the current fair market rents for existing housing under Section 8 Housing Assistance Payments Program for Elevator or Non-Elevator (as appropriate) Buildings: (I) efficiency rental units; (II) one bedroom rental units; (III) two bedroom rental units; (IV) three bedroom rental units; (V) four or more bedroom rental units; so that the rates are not lower than $267 for one bedroom, $314 for two bedroom, $408 for three or more bedroom and $221 for efficiency rental units; and

"(ii) total the results obtained in phrase (i).".

Sec. 4. This act shall take effect on February 28, 1979, and shall remain in effect for ninety (90) days as an emergency act of the Council of the District of Columbia, enacted pursuant to section 412(a) of the District of Columbia Self-Government and Governmental Reorganization Act, or until Act 2-260, the Condominium Conversion Act of 1978 becomes effective, whichever occurs first.

/s/ Arrington Dixon
Chairman
Council of the District of Columbia

Date of Council Action: February 13, 1979
Adopted by Unanimous Voice Vote
Transmitted to the Mayor: February 16, 1979

/s/ Marion Barry
Mayor
District of Columbia

Approved: February 23, 1979

APPENDIX F

Emergency Legislation

Effective: January 25, 1979

Expires: April 25, 1979

AN ACT

3-2

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

To regulate, on an emergency basis, the conversion of rental housing accommodations to cooperative housing accommodations, and for other purposes.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "First Emergency Cooperative Regulation Act of 1979".

* * * *

(7) The term "high rent housing accommodation" means any housing accommodation in the District of Columbia for which the total monthly rent exceeds an amount computed for such housing accommodation as follows:

(i) multiply the number of rental units in the following categories by the corresponding rents established by the United States Department of Housing and Urban Development for the District of Columbia as the current Fair Market Rents for Existing Housing under the Section 8 Housing Assistance Payments Program for Ele-

vator and/or Non-Elevator Buildings: (I) efficiency rental units; (II) one bedroom rental units; (III) two bedroom rental units; (IV) three bedroom rental units; (V) four or more bedroom rental units; so that the rates are not lower than $267 for one bedroom, $314 for two bedrooms, $408 for three or more bedroom, and $221 for efficiency rental units; and

(ii) total the results obtained in subparagraph (i) above.

* * * *

Sec. 3. The Mayor may grant an exemption to the provisions of this act in any case where he finds that:

(a) less than fifty(50) percent of the units in the multi-family housing accommodation being converted to a cooperative are occupied;

(b) if more than fifty (50) percent of such units are occupied, at least fifty-one (51) percent of the lessees of such units have agreed in writing to the conversion of such housing accommodation to a cooperative; or

(c) if the housing accommodation is a high rent housing accommodation at any time after the effective date of this act. The exemptions provided for in this section shall be granted only upon application and shall not be granted in less than ten (10) days after such application is made.

* * * *

Emergency Legislation
Effective: May 4, 1979
Expires: August 2, 1979

AN ACT
3-37

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

To regulate, on an emergency basis, the conversion of rental housing accommodations to cooperative housing accommodations, and for other purposes.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Second Emergency Cooperative Regulation Act of 1979".

* * * *

Sec. 12. This act shall take effect upon the expiration of the First Emergency Cooperative Regulation Act of 1979 (Act 3-2) on April 25, 1979 and shall remain in effect for ninety (90) days as provided for emergency acts of the Council of the District of Columbia in section 412(a) of the District of Columbia Self-Government and Governmental Reorganization Act.

/s/ Arrington Dixon
Council of the District of Columbia
Date of Council Action: April 10, 1979
Adopted By Majority Voice Vote; All present
Transmitted to the Mayor: April 20, 1979
Chairman

/s/ Marion Barry
Mayor
District of Columbia

Approved, May 4, 1979

APPENDIX G

Emergency Legislation

Effective: May 29, 1979

Expires: August 27, 1979

AN ACT

3-44

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

To protect rental housing in the District of Columbia.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Emergency Condominium and Cooperative Stabilization Act of 1979".

Sec. 2. (a) The Mayor shall not declare any housing accommodation, as defined in section 102(f) of the Rental Housing Act of 1977 (D.C. Law 2-54), eligible to convert to a condominium pursuant to section 501(b)(1)(A) of the Condominium Act of 1976 (D.C. Law 1-89; D.C. Code, sec. 5-1281(b)(1)(A)).

(b) The Mayor shall not issue any notice of filing of an application for registration of a condominium pursuant to section 406(a) of the Condominium Act of 1976 (D.C. Law 1-89; D.C. Code, sec. 5-1266(a)) if that housing accommodation was declared eligible to convert pursuant to section 501(b)(1)(A) of the Condominium Act of 1976 (D.C. Law 1-89; D.C. Code, sec. 5-1281(b)(1)(A)): EXCEPT, as provided for in section 4 of this act.

Sec. 3. (a) The Mayor shall not grant any housing accommodation, as defined in section 102(f) of the Rental Housing Act of 1977 (D.C. Law 2-54) an exemption to convert to a cooperative pursuant to section 3(c) of the Second Emergency Cooperative Regulation Act of 1979 (Act 3-37).

(b) The Recorder of Deeds shall not file any Articles of Incorporation pursuant to section 29-806 of the District of Columbia Code (D.C. Code, sec. 29-806) for a housing accommodation exempted from the Second Emergency Cooperative Regulation Act of 1979 pursuant to section 3(c) of such act: EXCEPT, as provided for in section 4 of this act.

* * * *